84-229

NO. ____

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

JOSEPH ACCARDI, et al.,

Petitioners

v.

ROBERT J. DAVIDSON, JR. as a participant in, and for and on behalf of Local 666 Benefit Trust Fund, et al.,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the Court of Appeals erred in failing to apply ERISA'S three-year statute of limitations where the Plaintiff had actual or constructive information from which he could reasonably have concluded ERISA violations had occurred.

LIST OF PARTIES

PETITIONERS:	Joseph Accardi, Reginald Baker, John L. Cook, William Joseph Nash, Jr., and Leroy Van Fossen, Sr.
RESPONDENTS:	Robert J. Davidson, Jr., as a participant in, and for and on behalf of Local 666 Benefit Trust Fund.
	Joseph Jernigan, Charles P. Wilson, Mark I. Singer and William Gifford, as Trustees for the Local 666 Benefit Trust Fund.
	Shirley A. Zahn, Administrator of the Estate of Willie M. Zahn, former Administrator of Local 666 Benefit Trust Fund.
	McGuire, Woods & Battle, a partnership, and its individual partners.

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OPINION BELOW

The petitioners Joseph Accardi, Reginald

Baker, John L. Cook, William Joseph Nash, Jr. and Leroy Van Fossen, Sr. jointly and respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on April 11, 1984.

JURISDICTION

The judgment of the Court of Appeals was entered on April 11, 1984. This petition for a writ of certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

Employee Retirement Income Security Act of 1974 (ERISA), codified as amended in 5 U.S.C. §5108(f), scattered sections of 26 U.S.C., and 29 U.S.C. §§1001 and

following. ERISA's statute of limitations, found at 29 U.S.C. §1113, provides as follows:

> §1113. Limitation of actions
>
> (a) No action may be commenced under this subchapter with respect to a ficuciary's breach of any responsibility, duty or obligation under this part, or with respect to a violation of this part, after the earlier of --
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (b) in the case of an omission, the latest date on which the fiduciary could have cured the breach or villation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this subchapter;

STATEMENT OF THE CASE

The plaintiff, Robert J. Davidson ("Davidson"), filed his Complaint on

October 19, 1981 against former and current trustees of the Local 666 Benefit Trust Fund (the "Fund"). The Fund is an employee welfare benefit plan and an employee benefit plan within the meaning of ERISA and is therefore covered by ERISA'S provisions as to fiduciary responsibility and reporting and disclosure.

The Fund provides health and welfare benefits to electrical workers and their families. Davidson brought this action "as a participant in, and for an on behalf of" the Fund. He claimed that the Fund's extension of credit in 1975 to REBCOR, a wholly owned subsidiary of Local Union 666, International Brotherhood of Electrical Workers of Richmond, Virginia, AFL-CIO (the "Local"), constituted a prohibited extension of credit to a "party-in-

interest" in violation of ERISA §406(a)(1)(B) and (D), 29 U.S.C. §1106(a)(1)(B) and (D). He claimed that the extension of credit and the maintenance of the loan in the Fund's portfolio violated the Fund trustee's obligations to act solely for the exclusive benefit of the plan participants and the beneficiaries, to abide by the statutory standards of prudence, and to diversify investments of the Fund so as to minimize the risk of loss, all in violation of ERISA §404(a)(1), 29 U.S.C. §1104(a)(1). He further claimed that the trustees breached their co-fiduciary responsibilities under ERISA §405, 29 U.S.C. §1105, by allegedly concealing their conduct, thus enabling fellow fiduciaries to breach their responsibilities. Davidson sought to

have the Fund trustees held personally liable for any losses resulting from alleged breaches of fiduciary duties pursuant to ERISA §409(a), 29 U.S.C. §1109(a). He did not allege or seek to prove that any of the trustees had sought to gain personally from their trusteeships.

Davidson named as defendants, in their individual and trustee capacities, the Fund's five current trustees and eight individuals who at various times since 1968 served as trustees of the Fund, including petitioners Accardi, Baker, Cook, Nash and Van Fossen. Davidson also named as a defendant Shirley A. Zahn, the administratrix of the estate of Willie M. Zahn who served as administrator of the Fund from 1968 until 1980.

The trial court did not hear live

testimony but rather based its holding upon the stipulations of the parties. It concluded that the three-year statute of limitations barred Davidson's claims against the lending Trustees for failure to diversify investments, §404(a)(1)(C), 29 U.S.C. §1104(a)(1)(C); failure to follow the plan documents, §404(a)(1)(D), 29 U.S.C. §1104(a)(1)(D); engaging in a party-in-interest transaction, §406(a)(1)(B), 29 U.S.C. §1106(a)(1)(B); and transferring assets to a party-in-interest, 29 U.S.C. §1106(a)(1)(D). (Mem. Op. p. 13). It concluded also that Davidson had not established that the lending Trustees knew of any breach of fiduciary duties by their co-fiduciaries and that there was no concealment of any act by any of the lending Trustees.

The trial court concluded that the lending Trustees violated ERISA

§404(a)(1)(A)(i), 29 U.S.C. §1104(a)(1)(A)(i) by not performing their duties for the exclusive purpose of providing benefits to participants and beneficaries. (Mem. Op. p. 15). It also held that the lending Trustees violated ERISA §404(a)(1)(B), 29 U.S.C. §1104(a)(1)(B) by not exercising prudence in making the original and supplemental loans. (Mem. Op. p. 15). It held that lending Trustees Nash and Van Fossen violated ERISA §406(b)(2), 29 U.S.C. §1106(b)(2) by serving as Trustees of the Fund while at the same time serving as directors or REBCOR. The trial court found the lending Trustees personally liable to the Fund for losses it calculated the Fund had suffered.

Davidson is a former member of the Local, having had his membership in the Local terminated as a result of his

failure to pay his union dues. (Stip. ¶¶ 6, 178). During the years of his membership in the Local, he was attentive to its affairs. He ran unsuccessfully for president of the Local in 1973, was a a member of the Board of the Local's credit union, served on a committee to administer its proposed vacation fund and served on the Local's pension committee. (Ex. 92.1, pp. 24, 26, 30-31 and 41).

The lending Trustees served the Fund voluntarily and without compensation. Petitioners Accardi and Baker served at the request of the National Electrical Contractors Association ("NECA"), and Cook, Nash and Van Fossen were appointed as trustees by the Local (Stip. ¶ 1).

In 1971 the Local established a Building Committee to purchase property and construct a building to house the Local's offices. (Stip. ¶ 20). The Local

later created a subsidiary building corporation known as REBCOR to acquire land and construct an office building which was to be used by the Local and to generate rental income.

Local and REBCOR officials, who were one and the same, had considered financing alternatives to the proposed REBCOR building in the early 1970s. After receiving advice from the law firm of McGuire, Woods & Battle, the trustees in November, 1972 agreed to negotiate with REBCOR for a first mortgage loan. (Stip. ¶ 34).

In may 1974, the Local voted to proceed with the building. Its members agreed that if additional money should be needed to meet the construction expenses, they would return to the Local for any necessary assessments.

In June 1974 the Fund trustees had

agreed to negotiate the financing of a loan to REBCOR for the construction of the building subject to review of the proposed transaction by McGuire, Woods & Battle. (Stip. ¶ 65). The Trustees never received any advice from their counsel that the loan may violate any provision of ERISA.

In August, 1975, Fund Administrator Zahn reported that additional funds would be needed to complete the construction of the REBCOR building. The Trustees agreed to increase the loan to REBCOR to $1.4 million. Disbursements from the Fund to REBCOR for the construction continued until March 1976 at which time the principal balance was slightly in excess of $1.4 million. (Stip. ¶114).

REBCOR had difficulty in meeting current interest due on its obligations to the Fund during 1976. The then

sitting Trustees were not made aware by the administrator or the Fund accountants of the accumulating deficiencies in interest on the REBCOR notes before January 1977. (Stip. ¶ 132 and 135; Mem. Op. p. 5). In January 1977 and the months following, the Trustees undertook measures to ensure that the delinquent interest would be paid and that future debt service would remain current. In June 1977, the Trustees restructured the REBCOR loan.

Davidson regularly attended Local meetings and is sure that he attended meetings in 1974. (Ex. 92.1, p. 103). At a meeting of the Local held in February of 1974, Administrator Zahn reported that the cost of the proposed building was rising rapidly and that there was anticipated to be enough rental space to support the building, "but not to pay the

mortgage. Hopefully the Benefit Trust Fund will lend us the money." (Stip. ¶ 49, Mem. Op. p. 3). Thus, Davidson was aware even before the Fund loaned the money to REBCOR that REBCOR would not be in a position to service that loan. He was aware, as well, that the Fund had made the loan to REBCOR before the building was completed. (Ex 92.1, p. 185).

It is clear from meeting minutes, correspondence and the deposition testimony of numerous witnesses, including Davidson, that the Fund, the Local and Davidson were concerned about the problem of REBCOR's delinquent interest in early 1977. On February 28, 1977 Wayne Stallard, president of REBCOR and the Local, attended a meeting of the Trustees to discuss the REBCOR loan. Stallard indicated to the Trustees at

this meeting that REBCOR had commissioned an appraisal of the REBCOR building. That apparaisal valued the land and improvements at approximately $960,000 with a liquidation value as low as $860,000. (Stip. ¶¶ 153 and 157).

Not only were the Trustees of the Fund and officers of REBCOR attempting to solve the problems associated with the REBCOR loan in 1977, Davidson himself at this time was concerned about the apparent delinquencies and the making of the loan itself. His concern about the loan was evidenced by his opposition to a Local dues assessment which would have been used to help finance the building. Davidson was aware not only of the fact of the Fund's having made the REBCOR loan, he was aware in 1977 as well of the problems with delinquent interest. (Stip. ¶ 152; Ex. 3, p. 30; Ex. 92S, pp. 100-

101).

Davidson attended a meeting of the Local on February 4, 1977, at which it was reported that a meeting between participants of the Fund and the Trustees was to be held on March 9, 1977. At this same meeting, the minutes of a REBCOR meeting were read to the Local members. Those minutes reflect that Wayne Stallard, president of the Local, shared with the REBCOR Board a letter from the Fund requesting a solution to the increasing problem of unpaid interest. (Stip. ¶ 152; Ex. 3, p. 30). The Local president, Wayne Stallard, shared the findings of the REBCOR building appraisal with the members of the Board of REBCOR, the executive board of the Local and with the Local membership. (Ex. 92S, pp. 100-101).

Before the March 1977 Fund

participants meeting, Davidson voiced his continuing concerns by telephone to an employee of the Department of Labor. He informed a Mr. Brophy of the Department of Labor that he was a participant in a trust fund that had loaned money to a labor union and that he was concerned about the money that was invested by the Fund. (Ex. 91I, p. 141). Davidson was concerned at that time about the Fund's waiver of interest. He expressed this concern as well to Mr. Brophy. (Ex. 92I, p. 144). Davison had concluded as of this time that the Fund's loan to REBCOR was "probably a stupid thing to have gotten into...." (Ex. 92I, p. 142).

Brophy informed Davidson that there was probably something improper about the transaction and left him with the impression that he was upset about the facts that had been relayed to him.

Brophy even read to Davidson a section of what Davidson assumed were government regulations relating to loans between unions and trust funds. (Ex. 92I, pp. 145, 147). The concerns expresssed by Brophy were the same concerns that the plaintiff himself had entertained during 1976 and 1977. Davidson also called the Internal Revenue Service in 1977 to determine what rights he may have as a participant if in his opinion the plan was being improperly managed. (Ex. 92I, pp. 153-154). He told an IRS employee that interest due the Fund had been waived and that he did not think it was proper.

Linda Clifton, the current manager of the Fund and a Fund employee during 1977, attended the March 1977 meeting of the Trustees and plan participants. She recalled that Davidson introduced himself

at the meeting and asked questions or commmented at length about the REBCOR loan transaction. At that meeting Davidson clearly expressed opposition to the REBCOR loan transaction. (Ex. 92G. pp. 505-507).

After the March 1977 participants meeting, Davidson once again telephoned Brophy at the Department of Labor. Brophy informed him that if there were any problems he should write a letter. This was Davidson's last effort to contact anyone at the Labor Department, and he did not pursue Brophy's suggestion that he express his concerns in written form. (Ex 92I, pp. 149-151).

On May 31, 1977, Davidson wrote to B. G. Williamson, International Vice President of IBEW and expressed his extreme displeasure with the Local's decisions to construct the REBCOR

building. He complained to Williamson that Local members were asked to "take money from our families to pay for a real estate venture, which was mismanaged from the beginning, that will never show a return in my working lifetime. On top of this, over $1,000,000 of Local 666 Benefit Trust Fund money is also invested in this white elephant." (Stip. ¶ 181).

Davidson was aware in 1977 that there were certain trustees of the Fund who were also officers of REBCOR. (Ex. 92I, p. 334). He was aware as well of the second loan which had been made by the Fund to REBCOR in 1976. (Ex. 92I, p. 286).

In May, 1976, Davidson was informed of his rights as a participant to review plan documents and plan information, including the Fund's annual reports which were required to be filed with the

Department of Labor. (Stip. 117; Ex. 92G. pp. 509, 511). Despite the plethora of information formally available to davidson, and aside from the extensive knowledge he had acquired through a free flow of information, it never occurred to him to review or to request Fund documents or files.

Davidson in 1977 reasonably and correctly assumed that the Fund would be required to file forms with a government agency. When he spoke with the Department of Labor employee he assumed that there must be a filing requirement. However, he never asked to receive or to review copies of any forms that the Fund was required to file because, in his opinion, various barances of federal and state government "covet highly all of their information." Despite his expressed concerns, Davidson apparently

did not consider obtaining legal counsel until some four years later. (Ex 91I, pp. 283-284, 316, 339).

The Fund is in fact required to file its annual financial statements with the Department of Labor. The required Form 5500 was prepared by Administrator Zahn and filed by the Fund with the Department of Labor during the lending Trustees' tenure in office. (Stip. ¶ 270; Ex. 92A. p. 59). Form 5500 for the Fund year 1976 was filed in August 1977. That form reveals, among other things, the net assets of the Fund at the beginning and end of the year and the principal indebtness of the REBCOR note as of December 31, 1976 and July 31, 1977. It answers "yes" to the questions whether any of the loans by the plan were in default, and then it explicitly documents the steps taken by the Fund to remedy the

delinquent REBCOR interest payments. (Ex. 5B).

REASONS FOR GRANTING THE WRIT

In its opinion, the Court of Appeals concluded that the trial court had provided a "thorough treatment" of the issues presented by the parties, and therefore deemed a full discussion of the trial court's findings "unwarranted." The Petitioners must, therefore, address the issues as they were dealt with by the trial court because of the lack of discussion of those issues by the Court of Appeals.

Perhaps because of its recent enactment, there is an absence of definitive judicial construction of ERISA's statute of limitations. While there are no conflicts among the Circuits on this issue, the District Courts'

resolution of this issue, if followed, would leave current and former Trustees of pension and health and welfare funds vulnerable to lawsuits by those who have failed to exercise their rights or those to whom constructive knowledge should otherwise be imputed. Volunteer trustees should be encouraged to serve such Funds, and it would defeat the salutory purposes of ERISA if it should be interpreted to subject such persons to liability when the time for presenting claims against them has long past.

It is instructive to review those claims which the District Court found time-barred and to compare them to the ERISA claims which it left intact. Without explanation, the District Court reached the anomalous result that some claims were time-barred while others, based upon the same essential facts, were

not. The District Court dismissed as time-barred claims for fiduciary breaches for failure to diversify investments, engaging in a party in interest transaction and transferring assets to a party-in-interest. Similarly, it barred Davidson's claim that by not adhering to Virginia's Prudent Man statute, now Virginia Code §26-45.1 (Cum.Supp. 1983), the Trustees had failed to follow plan documents. It then concluded that Davidson's claims that the lending Trustees did not act for the exclusive purpose of providing benefits to participants and their failure to abide by ERISA's Prudent Man standards, which cannot in substance be differentiated from Virginia's Prudent Man statute, were not barred by the passage of time. (Mem. Op. p. 13).

All of Davidson's claims against the

lending Trustees are barred by ERISA's statute of limitations. While the legislative history of this section of ERISA is sparse, its language is unambiguous. If Davidson had either actual knowledge of the violations about which he complained, or if the Fund filed a report from which he could have gained such knowledge, he had three years after either of these events within which to file his complaint. It is clear that Davidson had actual knowledge of the essential facts supporting his claims before October 19, 1978.

A. ERISA's Prudent Man Rule

The details of the loan transaction about which Davidson complained are clearly disclosed in the annual report Form 5500 for the 1976 Fund year which was filed with the Department of Labor in August of 1977. That form reveals the

net assets of the Fund, both at the beginning and the end of the calendar year of 1976. It reveals as well the principal indebtedness of the REBCOR notes as of December 31, 1976 and as of July 31, 1977, thus showing the relative concentration of Fund assets in the REBCOR loan. It disclosed that the Fund held a party-in-interest investment in a mortgage which had increased from $1,078,531 to $1,413,803 during 1976 and that the loan was in default or classified as uncollectible as of the end of that year. It notes that the Fund attorney was requested to start foreclosure proceedings and that in June of 1977 an agreement was reached between REBCOR and the Fund. That agreement, which is reflected in the June 21, 1977 letter from Administrator Zahn to Wayne Stallard of the Local, was included as an

attachment to the Form 5500. The District Court concluded that this form was sufficient to trigger ERISA's three year statute of limitations as to certain of Davidson's claims. Davidson's remaining ERISA claims are barred as well, as revealed by a review of the facts Davidson knew constructively through the filing of public documents and his actual knowledge of all of the essential facts supporting his claims.

Davidson was an active member of the Local in the early 1970s and is sure he attended meetings in 1974. In February 1974, Administrator Zahn advised the Local membership that the anticipated rental income from the proposed Local building would not be adequate to service the mortgage. This was a fact emphasized in the District Court's opinion as evidence of the lending Trustees' failure

to investigate this loan properly, thus violating ERISA's Prudent Man standards. (Mem. Op. pp. 3, 16-17). The District Court pointed out that it was also stated at this meeting that there was a hope that the Fund would provide the financing for the building. Thus, Davidson was aware as early as 1974 that the Fund was considering providing a mortgage loan to a borrower who admittedly showed no promise of being able to repay it. Davidson was aware not only of the prospect of the Fund's providing financing, he was aware before the completion of the construction that the Fund had provided the financing to REBCOR.

While the District Court emphasized the fact that the lending Trustees failed to investigate properly the source of the mortage repayment, as evidenced by the

minutes of the February 1974 meeting, it listed other actions which it concluded revealed imprudence on the lending Trustees' part. It concluded that standing alone, it could not say that failure to take any of the listed steps would constitute a breach of fiduciary duty. For the most part, however, failure to take those necessary precautions are clearly revealed in the Form 5500 filed in 1976. In that form, the Fund attached the terms and conditions of the Deed of Trust Note for the full $1.5 million loan. The note reveals that the Fund had made an interest only loan with no required principal amortization. There is no requirement in the note that REBCOR provide any guarantors or sureties. Finally, the note runs only from REBCOR to the Fund with no suggestion that the Local had any

obligation whatsoever. This is reinforced by a demand letter attached to the form from the Fund to Wayne Stallard as president of REBCOR on June 21, 1977.

Another factor which the District Court considered relevant to its finding of a breach of ERISA's Prudent Man standard was under-collateralization of the REBCOR loan. This was a fact, however, which was known to Davidson well in advance of October 19, 1978. He was made aware in 1977 of the appraised values of the REBCOR building, which appraisals were commissioned by REBCOR. (Ex. 92I, p. 287). He was aware of the existence of the two notes evidencing the $1.5 million in loans to REBCOR. At the very least, he was constructively informed of the outstanding balance on those loans by the Fund's filing of Form 5500.

Davidson had argued in the trial court that the market value of the REBCOR building as reflected on that form was misleading in light of the substantially lower appraised value of the building. The District Court concluded that using the actual cost figure rather than the appraised value did not deprive Davidson of constructive knowledge, but at most it deprived the Trustees of a defense they may have established if they had disclosed that the loan was under-collateralized. It held that the lower value may have helped to provide constructive knowledge of the breach of duty to invest prudently. (Mem. Op. pp. 12-13). 229). The District Court simply overlooked the fact that Davidson himself had actual knowledge of the appraised value of the building and that he was thus aware of the gross under-

collateralization of this loan. This integrated view of Davidson's actual and constructive knowledge reveals that his claims are time-barred. The District Court's failure to employ this approach, or in some instances its overlooking facts essential to this defense, resulted in its anomalous conclusions.

The District Court concluded that Davidson's claims of breaches of fiduciary duty for failure to diversify investments were barred by ERISA's statute of limitations. It is entirely possible for a fiduciary to adhere to this ERISA standard and diversify the assets under his oversight while at the same time violating ERISA's Prudent Man standards. A portfolio may consist of diversified investments which nevertheless have been imprudently acquired. The circumstances are not

conceivable where a loan constituting over ninety percent of the plan's assets for a local real estate venture would not be imprudent. Thus, lack of diversification in this instance is further evidence of failure to abide by ERISA's Prudent Man standards. The District Court correctly concluded that the Fund's lack of diversification was known to Davidson well before October 19, 1978.

B. Exclusive Benefit Requirement

The District Court held that in making both the original and supplemental loans, the lending Trustees did not perform their duties for the exclusive purpose of providing benefits to participants and their beneficiaries. It cites in support of this conclusion Marshall v. Kelly, 465 F.Supp. 341, 350 (W.D. Okla. 1976) which found violations

of ERISA by the making of what the District Court characterized as "sweetheart loans." In that case the Court concluded that the trustee had failed to discharge his duties in the sole interest of the plan participants by causing the pension plan to renew loans to a company owned by that trustee. It characterized the party-in-interest affiliations as "obvious." Id. at p. 351. It cannot be doubted that Davidson was aware of the incestuous relationship created by the making of this loan among the Fund, the Local and REBCOR. There was an obvious identity of interests between the Local and REBCOR and Davidson was well aware of it. The District Court relied on circumstantial evidence and reasonable inferences to conclude that the fiduciaries were attempting to satisfy the desires and needs of the

Local rather than solely to provide benefits to Fund beneficiaries. (Mem. Op. p. 15). It concluded that while that purpose was not dishonest, it nevertheless was not the exclusive purpose for which fiduciaries must dedicate their efforts. The District Court's conclusion was correct. The correctness of its decision is evident from the mere fact of the making of a "sweetheart" loan. Curiously, however, the District Court did not address the issue of the statute of limitations as it relates to this claim.

Not only is it a fair inference that Davidson would have concluded that the loan transaction was not for the exclusive benefit of Fund beneficiaries, he in fact had concluded that. In 1977, he informed Mr. Brophy in a telephone conversation, without identifying the

parties, that a loan had been made from a health fund in which he was a participant to the union which sponsored the health fund. (Ex. 92I, p. 142). He stated as well that there were trustees from the Fund appointed by "parent groups that were involved in the collective bargaining agreement." He testified further that he told Brophy that there had been interest on late payment that Davidson believed "should have been the Fund to protect the hospitalization." Brophy in turn was "very upset" about the transaction that Davidson described to him. (Ex. 92I, p. 145). 511).

On May 31. 1977 Davidson wrote "with heavy heart" to the International Vice President expressing a number of his concerns about Local activities. He noted that Local members have been asked "to take money from our families to pay

for a real estate venture, which was mismanaged from the beginning..." and in which the "Benefit Trust Fund money is also invested...." (Stip. ¶ 181). At that time he believed that the appointment of Fund trustees by the person who was president of the Local and also president of REBCOR was "highly irregular." (Ex. 92I, p. 333). It is the nature of the relationships among the parties that supports Davidson's complaint that the lending Trustees committed Fund assets for reasons other than strictly for the good of the beneficiaries. Not only was he aware of the relationships well before October 19, 1978, he was concerned enough about them to bring them to the attention of public officials and union officers. While he acknowledged that he "may have thought about" obtaining a lawyer to seek redress

of his grievances in 1976 or 1977, he simply chose to do otherwise. (Ex. 92I, p. 339).

Davidson knew that the loan was made for purposes other than to provide for Fund beneficiaries, not only through his intimate familiarity with all parties involved, but also because of his knowledge of the apparent imprudence of making this loan. He had at the very least constructive knowledge that the loan was made only to REBCOR. He was aware again, at the very least constructively, of the over-concentration of Fund assets which this loan occasioned. While the trustees believed that they had obtained a fair rate of return and that they had made a legally tenable investment, it is equally clear that they were intent upon investing in the Local's project.

C. Conflicts of Interest

The District Court concluded that Nash and Van Fossen violated ERISA §406(b)(2), 29 U.S.C. 1106(b)(2) by serving as trustees of the Fund while also serving as directors of REBCOR. There can be little doubt that this dual role placed these trustees, albeit unwittingly, in positions of conflict. There also can be no doubt that Davidson was aware at least by 1977 that Local officials had accepted these dual roles. Local members received regular reports about the progress of the proposed new Local building from members of the Building Committee. The Local's Building Committee evolved ultimately into the separate entity known as REBCOR, and elected officers of the Local served as officers and directors of REBCOR as well. That was a fact known to all Local

members, and as noted previously, Davidson was a regular attendee at membership meetings.

Davidson was questioned in deposition about his May 31, 1977 letter to International Vice President B. G. Williamson in which Davidson expressed his concerns about a number of the procedures being employed by the Local. He was asked whether he was aware at that time that there were trustees of the Fund who were also officers of REBCOR. His simple answer was "yes, I believe I do, I believe I remember that." (Ex. 92I, p. 334; Stip. ¶ 182). Davidson then correctly noted that trustees Noonan and Bowles did in fact act as Fund trustees and directors of REBCOR as of the time of Davidson's writing the letter about which he was being questioned. The District Court correctly held that ERISA's statute

of limitations bars Davidson's claims against Noonan and Bowles for violating ERISA's conflict of interest standard because Davidson was plainly aware of their compounded loyalties. However, it plainly overlooked Davidson's knowledge of the fact that other Fund trustees appointed by the Local had also been directors of REBCOR. That, of course, includes lending Trustees Nash and Van Fossen who acted in these dual capacities before trustees Noonan and Bowles.

The lending Trustees emphasize that they do not challenge on appeal the accuracy of the District Court's factual findings related to the statute of limitations; those findings are simply incomplete. The result is that the District Court concluded that certain of Davidson's claims were barred by the statute of limitations while others,

based on facts unrecognized by the District Court, but which Davidson plainly either actually or constructively knew, were not barred. Second, the District Court apparently required the lending Trustees to demonstrate that Davidson had actual knowledge of all of the details surrounding the breaches of fiduciary duty, a standard contrary to accepted judicial construction of federal statutes of limitation. Davidson had knowledge of the essential facts supporting his untimely complaint more than three years before its filing. Costly discovery simply permitted him to gather detailed information supporting his claims. Those facts were ultimately submitted to the District Court in the form of a deluge of stipulations and exhibits which are not inconsistent with what Davidson knew by at least 1977 or

with information to which he had ready access.

It has been demonstrated repeatedly that Davidson was aware in 1977 of the facts which supported his claims against the lending Trustees. In Prather v. Neva Paperbacks, Inc., 446 F.2d 338, 341 (5th Cir. 1971) (construing federal copyright limitations, 17 U.S.C. §115(b)) the court noted that the plaintiff's not having a copy of a book which supported his copyright claim was "merely ignorance of evidence, not ignorance of a potential claim." As in Prather, Davidson did not have in his possession, "the precise minutiae," of all the detailed circumstances, but he had actual knowledge of the essential facts supporting his claim before October 19, 1978. The statute of limitations is not tolled while a plaintiff "ferrets the facts." Id.

This Fourth Circuit has had occasion recently to state again that the federally applied rule that the statute of limitations begins running when "the plaintiff discovers, or by the exercise of due diligence should have discovered, the facts forming the basis of his cause of action." Blanck v. McKeen, 707 F.2d 817, 819 (4th Cir. 1983). While there are few cases of precedential value applying ERISA's statute of limitations, prior cases under other federal acts or federal interpretations may be relied upon in construing accrual of causes of actions. The federal standard for accrual of claims does not vary among federal statutes. Lavellee v. Listi, 611 F.2d 1129, 1139 n.4 (5th Cir. 1980) citing, by way of example, Bierline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977). In Blanck v. McKeen, the Fourth

Circuit held, in reliance upon Fitzgerald v. Seamens, 553 F.2d 220 (D.C. Cir. 1977), that it was not necessary that plaintiffs knew "all of the persons involved in, or all of the details of, [defendants'] alleged torts." The Court concluded that the action was time-barred as long as the plaintiffs were on notice of the conduct about which they complained. Id at p. 820. It has been amply demonstrated that Davidson had an abundance of information to put him on notice of his cause of action.

Davidson may not be heard to argue that he was denied access to Fund information or that he was not in a position to appreciate the legal implications of information which he actually or constructively had received. In United States v. Kubrick, 444 U.S. 111 (1979) the Supreme Court reversed a Court

of Appeals decision that a Federal Tort Claims Act medical malpractice claim was not barred by the Act's two year statute of limitations. It disagreed with the Court of Appeals' apparent justification for its ruling that the "technical complexity" of the case provided the plaintiff with additional time. This Court, in language applicable to this case, stated:

> But determining negligence or not is often complicated and hotly disputed, so much so that judge or jury must decide the issue after listening to a barrage of conflicting expert testimony. And if in this complicated malpractice case, the statute is not to run until the plaintiff is led to suspect negligence, it would be difficult indeed not to apply the same accrual rule to medical and health claims arising under other statutes and to a whole range of other negligence cases arising under the Act and other federal statutes, where the legal implications or complicated facts make it unreasonable to expect the injured plaintiff, who does not seek legal or other appropriate

advice, to realize that his legal rights may have been invaded. Id. at p. 124.

This case is complicated only by the quantity of documents and the number of witnesses who have been called upon to testify. Failure to apply the Supreme Court's reasoning in Kubrick to this case would have the practical effect of eliminating ERISA's statute of limitations. Trustees of health and welfare funds who have volunteered and served their time as fiduciaries would be subjected to defending lawsuits by plaintiffs who may consult with legal counsel in the indefinite future. In this case, as in Kubrick, postponement of the accrual of the plaintiff's claim "would undermine the purpose of the limitations statute...." Id. at p. 123. While not conceding that the plaintiff was not aware of his rights as a

participant, mere ignorance of one's rights will not toll the statute of limitations. United States v. One 1961 Red Chevrolet Impala Sedan, 457 F.2d 1353 (5th Cir. 1972). Because Davidson was already in possession of the critical facts supporting his claim, and facts which would "prompt a reasonable man to seek legal advice," his claim is time-barred. Schnurman v. United States, 490 F.Supp. 429, 435 (E.D. Va. 1980). See also, Katz v. Bank of California, 640 F.2d 1024 (9th Cir. 1981); Japanese War Notes Claim Ass'n of the Phillipines, Inc. v. United States, 373 F.2d 356 (Ct. Cl. 1967).

CONCLUSION

The Fourth Circuit's affirmance of the District Court sanctions the filing of ERISA claims in a manner which will

discourage trustee service to ERISA plans. When a record contains ample evidence, as does this one, that a plaintiff actually or constructively knew the essential facts supporting his claims beyond the statutory time limits, those claims should be judicially barred.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ROBERT J. DAVIDSON, JR.,
Plaintiff,
v.

JOHN L. COOK, et al.,
Defendants,
v.

AETNA LIFE & CASUALTY CO., et al.,
Third-Party Defendants.

C.A. No. 81-0913-R

Entered: June 30, 1983

ORDER

In accordance with the memorandum of the Court this day filed, and deeming it just and proper so to do, it is ADJUDGED and ORDERED as follows:

1. Plaintiff's motion pursuant to Fed.R.Civ.P. 15(b) to amend the pleadings to conform to the evidence be, and the same is hereby granted.

2. The motions of defendant Zahn and defendants Bowles et al. for leave to file third-party complaints against

McGuire, Woods & Battle, et al., be, and the same are hereby granted. Said third-party actions are hereby severed from the remainder of this action and consolidated for trial with Local 666 Benefit Trust Fund, et al. v. McGuire, Woods & Battle, et al., Civil Action No. 82-0221-R.

3. Judgment be, and the same is hereby entered against defendants Accardi, Baker, Cook, Koch, Nash, Van Fossen, and Zahn. Said defendants are jointly and severally liable to the Local 666 Benefit Trust Fund in the amount of $440,800.00, together with interest at the legal rate from the date of February 28, 1982.

4. The defendants named in paragraph 3 be, and the same are hereby directed to pay the plaintiff his reasonable counsel fees and costs incurred in prosecuting this action. Said defendants

are directed to confer with plaintiff in an effort to ascertain the appropriate amount of such payment.

5. Judgment be, and the same is hereby entered in favor of defendants Bowles, Gifford, Jernigan, Noonan, Parker, Singer and Wilson; as to his claims against them, the plaintiff shall take nothing.

6. Judgment be, and the same is hereby entered in favor of the cross-claim defendants, and cross-claim plaintiffs Gifford, Jernigan, Parker, Singer and Wilson shall take nothing.

7. All parties are hereby directed to submit any further evidence and briefing in accordance with Part VII of the Court's memorandum.

Let the Clerk send copies of this Order and the accompanying memorandum to all counsel of record.

IN THE UNITED STATES DISTRICT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

ROBERT J. DAVIDSON, JR.,
Plaintiff,

v.

JOHN L. COOK, et al.,
Defendants,

v.

AETNA LIFE & CASUALTY CO., et al.,
Third-Party Defendants.

C.A. No. 81-0913-R

Entered: June 30, 1983

MEMORANDUM

Plaintiff brings this action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), Pub.L.No. 93-406, 88 Stat. 829 (codified as amended in 5 U.S.C. § 1001 *et seq.*). Jurisdiction is conferred upon the Court by ERISA § 502(e),(f), 29 U.S.C. § 1132(e),(f). Following massive discovery and seemingly infinite motions, some of which were necessary, the parties stipulated to the pertinent facts 1/ and argued the case to

the Court. Several hundred pages of briefing later, the matter is ripe for decision. This memorandum constitutes the Court's findings of fact and conclusions of law for purposes of Fed.R.Civ.P. 52(a).

Plaintiff is a participant in the Local 666 Benefit Trust Fund ("the Fund"), which provides health and welfare benefits to certain electrical workers and their families; he brings this action "as a participant in, and for and on behalf of," the Fund. Plaintiff is a former member of Local Union 666, International Brotherhood of Electrical Workers of Richmond, Virginia, AFL-CIO ("the Local"), one of the parties that established the Fund in 1968.2/ The Fund is an "employee welfare benefit plan" and an "employee benefit plan" within the meaning of ERISA § 3(a),(3), 29 U.S.C. §

1002(1),(3), and accordingly is covered by ERISA's provisions as to fiduciary responsibility and as to reporting and disclosure. Defendants Accardi, Baker, Cook, Koch, Nash, and Van Fossen3/ were Trustees of the Fund from at least 1974 until at least June of 1976. Because of their initial involvement with a loan that is the subject of this action, they are hereinafter referred to as the "lending Trustees." Defendants Gifford, Jernigan, Parker, Singer, and Wilson are the current Trustees.4/ Defendants Bowles and Noonan served as Trustees following the terms of two lending Trustees, but are no longer Trustees. All of these defendants have been named "personally and as Trustees and former Trustees" of the Fund.5/ Defendant Shirley A. Zahn is the administratrix of the estate of Willie M. Zahn, who served

as administrator of the Fund from some time before its official inception in 1968 until 1980. For convenience and simplicity, the Court hereinafter refers to Willie M. Zahn as if he were the named defendant.

I. Factual Background

In 1971, the Local set up a Building Committee to investigate purchasing land and constructing a building thereon to serve as headquarters for the Local. Pursuant to official policy of the International Brotherhood of Electrical Workers, the Local incorporated a subsidiary to hold title to the property and building; the Local intended to insulate itself from responsibility for the building corporation's debts. Thus, on September 22, 1972, Richmond Electricians Building Corporation ("REBCOR"), wholly owned by the Local, was chartered under

the laws of Virginia. The President, Vice President, Treasurer and Recording Secretary of the Local hold corresponding offices in REBCOR; together with three individuals elected at large by the Local, they constitute REBCOR's Board of Directors.

In March 1973, REBCOR agreed to, and subsequently did, purchase a parcel of land at 1701 East Parham Road, Richmond, Virginia, for $137,500. Some time during the spring of 1974, Zahn and the President of REBCOR inquired about a construction loan from a commercial lender, but did not receive one. On May 23, 1974, the president of REBCOR executed a $1,757,500 contract for the construction of the REBCOR building on the Parham Road property. By August 1974, construction had begun.

As early as November 2, 1972, the

Trustees had discussed lending money to REBCOR on a first mortgage note and had agreed to negotiate with REBCOR in that regard. The minutes of the Local's meeting of February 1, 1974 show that Zahn reported that the cost of building was rising, and contrary to earlier reports, there was anticipated to be enough rental space to support the building "but not to pay the mortgage. Hopefully the Benefit Trust Fund will lend us the money." On June 7, 1974, a non-quorum group of the Trustees6/ adopted a motion to negotiate the financing subject to the following conditions:

> Our attorney should draw up the loan document on a first-mortgage basis, and when this is complete a committee of three, namely the administrator, the chairman, and the secretary of the Trust Fund meet with the attorney to review the loan document in order that a complete understanding may be had of its terms and conditions. After this is done, if the loan meets the approval of the

> committee of three, the entire trustees at a meeting would be presented copies for their final approval.

The Local held a membership meeting that night and announced that the Trustees had agreed to negotiate with REBCOR as to a loan.

As per the June 7, 1974 motion, the committee of three sought legal counsel as to the propriety of making the loan.7 At the Trustees' meeting on December 13, 1974, chairman Accardi reported that according to their legal counsel, making the loan "was not contrary to the Pension Reform Act." All six Trustees (Accardi, Baker, Cook, Koch, Nash and Van Fossen) then voted to lend REBCOR one million dollars at 10% annual interest, the interest to be paid monthly, and to consider lending further funds later if they were needed. At the same meeting, the Trustees received a report showing that

the Fund's total cash assets were $1,479,738.29. At that time, Fund administrator Zahn and Trustees Nash and Van Fossen were also directors of REBCOR.

On January 23, 1975, the president of REBCOR executed a Deed of Trust on the property and a Deed of Trust note for $1,000,000. The noted provided that interest at 10% per annum was to be paid monthly beginning March 1, 1975. The Deed of Trust reflected the parties' intention that the interest rate be adjusted from time to time, though it provided no mechanism for doing so. In the event of a late interest payment, REBCOR was to pay a penalty of 5% of the payment. The principal was due on demand, and in any event was to be paid by June 30, 1984.

At the August 25, 1975 Trustees' meeting, it was concluded that REBCOR

needed to borrow approximately $400,000 more to complete construction of the building. The five Trustees present (Baker was unable to attend) voted to increase the loan to $1,400,000. At this meeting, the Trustees received a report indicating the Fund's total cash assets were $1,467,133.33. As of this time, REBCOR had made only two of the seven interest payments that had come due; it owed over $10,000 in interest and penalties. There is nothing to warrant a conclusion that the Trustees knew of these delinquencies, although administrator Zahn, who had responsibility for recording the interest payments, obviously knew.

On October 20, 1975, REBCOR officers executed a Supplemental Deed of Trust and a Supplemental Deed of Trust note. The note increased the indebtedness to

$1,500,000 rather than the $1,400,000 agreed to at the August 24, 1975 Trustees' meeting. The note did not require REBCOR to reimburse the Fund for the interest on any borrowing the Fund might have to undertake as a result of having so much of its assets tied up in the REBCOR loan; at the August 24, 1975 Trustees' meeting, the Trustees had made the loan increase conditional on that requirement being imposed on REBCOR. Through March 1976, a total of at least $1,411,075.25 was disbursed under the loan, as supplemented.

REBCOR made no further interest payments from October 1975 through December 1976. On January 17, 1977, the Trustees held a meeting at which they learned that the interest payments were delinquent, and they directed Zahn to provide them an up-to-date accounting of

the loan status. By that time, REBCOR had accrued at least $151,937.09 in interest and $9,227.39 in penalties. There followed various correspondence among the Trustees and Zahn, meetings, an appraisal of the property, and, on February 28, 1977, a meeting of the Trustees[8/] and the president of REBCOR. At that meeting, the REBCOR president proposed a solution to the delinquency problem. Further discussions, correspondence, and meetings ensued, and at their June 16, 1977 meeting, the Trustees agreed to the following "cure": $86,196.81 of the unpaid interest was converted to principal, to make the total principal $1,500,000, as authorized by the Supplemental Deed of Trust note; the remaining $42,266.39 in unpaid interest was due; collection of the $7,874.72 in penalties was postponed for three years

and would be waived altogether if the interest payments were kept current throughout that period.

In June, 1980, the Trustees waived the late payment penalties, finding that REBCOR had kept up its interest payments over the three years since the cure.[9] In the time since the cure, the building has again been appraised. Some negotiations have taken place concerning the possible sale of the building, but it has not been sold. Though requested to do so, REBCOR has never provided a schedule for the repayment of the loan principal; REBCOR has, however, made a total of $200,000 in payments on the $1,500,000 principal.

II. Allegations

It is not surprising that the contentions in plaintiff's trial brief do not perfectly correspond to those he had

set forth in his complaint 15 months and many reams of pleadings earlier. Thus, plaintiff has moved pursuant to Fed. R.Civ.P. 15(b) to amend the pleadings to conform to the evidence. The Court assumes that the contentions set forth in the trial brief are those plaintiff avers he has proved.

A. Fiduciary duties: ERISA §404, 20 U.S.C. §1104.

Under 29 U.S.C. § 1104(a)(1)(A)(i), a fiduciary is required to discharge his duties for the exclusive purpose of providing benefits to participants and their beneficiaries. Plaintiff alleges each of the Trustees and Zahn violated this provision by providing a "sweetheart" loan to REBCOR and the Local, following their wishes rather than acting in the interest of the participants and benficiaries.

Plaintiff alleges each of the Trustees and Zahn violated 29 U.S.C. §

1104(a)(1)(B), which requires a fiduciary to discharge his duties in the same manner as a "prudent man acting in a like capacity and familiar with the matters" would act. Plaintiff alleges that the lending Trustees and Zahn failed to require assurances of payment as a prudent real estate lender would have done with regard to the original $1 million loan and the later supplemental loan of up to $500,000. He alleges that Zahn and the Trustees in office at the time of the cure10/ similarly failed to get proper documentation and guarantees. And he alleges that Zahn and the current Trustees have continued to violate this provision by failing to increase the interest rate, obtain a principal repayment schedule, seek sureties for the loan, etc.

Pursuant to 29 U.S.C. §

1104(a)(1)(C), the fiduciaries must divest the plan's investments "unless under the circumstances it is clearly prudent not to do so." The original loan committed over 67% of the Fund's assets to the REBCOR loan, and the supplemental loan and cure brought the level to something on the order of 95%. Plaintiff seeks to hold liable Zahn and the Trustees in office as of each of these times.

The final allegation with respect to fiduciary duties flow from 29 U.S.C. § 1104(a)(1)(D), which requires fiduciaries to discharge their duties in accordance with the documents and instruments governing the plan. The Declaration of Trust for the instant Fund requires the Trustees to invest "in accordance with the Prudent Man Statute of the State of Virginia (new Virginia Code Section 26-45.1)." The plaintiff alleges that the

original loan, the supplemental loan, and the cure violated this fiduciary standard, as well as that directly set forth in ERISA, by concentrating the Fund's assets in one investment.

B. Liability for breach of co-fiduciary: <u>ERISA § 405, 29 U.S.C. § 1105.</u>

Pursuant to 29 U.S.C. § 1105(a)(1), a fiduciary is liable for a co-fiduciary's breach of fiduciary duties if he knowingly participates in or conceals such a breach. Plaintiff alleges that throughout the history of the loans, the fiduciaries have engaged in such concealment. This allegation rests largely on the Trustees' failure to take action against Zahn once they learned that he had allowed the interest payments to become delinquent.

Similarly, 29 U.S.C. § 1105(a)(3) requires a fiduciary to make reasonable

efforts to remedy any known breach by a co-fiduciary. Plaintiff contends that the fiduciaries had the responsibility to learn of any breaches and then, pursuant to this provision, the duty to remedy them. Plaintiff seeks to attach liability under this section to each of the fiduciaries.

C. Prohibited transactions: ERISA §406, 29 U.S.C. § 1106.

Plaintiff alleges that the original loan, supplemental loan, and cure all violated 29 U.S.C. § 1106(a)(1)(B), which forbids a fiduciary to cause the fund to engage in a transaction which he knows or should know constitutes a loan with a party in interest. There is apparently no dispute that REBCOR constituted a "party in interest" within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14).

As a related matter, 29 U.S.C. § 1106(a)(1)(D) forbids a fiduciary to

cause the fund to transfer assets to a party in interest. Plaintiff contends that the 1980 waiver of late payment penalties pursuant to the 1977 cure constituted such a transfer of assets; he seeks to hold the 1977 Trustees, the 1980 Trustees and Zahn liable under this provision. Plaintiff also seeks to hold the current Trustees and Bowles liable under this section for failing to adjust the interest rate on the loans.

Finally, plaintiff alleges violations of 29 U.S.C. § 1106(b)(2), which prohibits a fiduciary from acting on behalf of a party whose interests are adverse to those of the plan, in a transaction involving the plan. Plaintiff alleges that lending Trustees Nash and Van Fossen and administrator Zahn violated this subsection in transacting the original loan and the supplemental loan

because all of them were also on the REBCOR board of directors at the time. Plaintiff also alleges a conflict of interest in the cure: Trustees Bowles and Noonan were also REBCOR directors at the time, and Trustee Jernigan was on the Local's executive board.

D. Current Trustees' cross-claim.

The current Trustees' cross-claim against the lending Trustees is based largely on the same allegations plaintiff makes. Thus, the current Trustees allege that the lending Trustees breached their fiduciary duties set forth in 29 U.S.C. § 1004(a)(1)(A),(B), and (C) by failing to exercise the required prudence and failing to diversify the investments. They allege that Zahn acted on behalf of an adverse party in violation of 29 U.S.C. § 1006(b)(2). Further, they allege that each cross-claim defendant violated 29

U.S.C. § 1105(a)(2) by allowing fellow fiduciaries to commit breaches.

III. Statute of Limitations

The lending Trustees contend that all claims against them are barred by ERISA § 413, 29 U.S.C. § 1113[11], the statute of limitations. Under that section, the basic limitation period of six years runs from the date of the breach or violation, except in case of fraud or concealment, when it runs from the date of discovery of the breach or violation. If there is no fraud or concealment, the six-year period can be reduced to three years if the defendant can show the plaintiff had either actual or constructive knowledge of the breach or violation; the three-year period runs from the time the plaintiff gained such knowledge. The kind of constructive knowledge that can reduce the period is that supplied by

a report, filed with the Secretary of Labor, from which the plaintiff "could reasonably be expected to have obtained knowledge of such breach or violation."

The basic six-year period runs from the date of the "last action which constituted part of the breach or violation." With regard to the allegations involving the original loan and the supplemental loan, the last action was the last disbursement of funds pursuant to the loans, in March 1976. Plaintiff's action filed October 19, 1981 clearly is not barred by the basic six-year limitation provision.

Nearly all of the current Trustees' cross-claim filed November 4, 1982 equally clearly _is_ barred by the six-year provision. The cross-claim is based almost entirely on the granting of the original loan and the supplemental loan.

To the extent the cross-claim concerns the administration of the loans after November 4, 1976,12/ it is not barred by the six-year provision. The remainder of the cross-claim, however, will be dismissed.13/

The lending Trustees seek to reduce the limitation period to three years by showing both actual and constructive knowledge on the part of the plaintiff. In an effort to come under the constructive knowledge provision of ERISA § 413(a)(2)(B), see note 11 supra and accompanying text, the lending Trustees rely on the Form 5500 for calendar year 1976 which the Fund filed with the Department of Labor in August 1977. That form disclosed that the Fund held a party-in-interest investment in a mortgage which had increased from $1,078,531 to $1,413,803 during 1976, that the Fund

held a loan which was in default or classified as uncollectable as of the end of the year, and that the Fund had engaged in a transaction or series of transactions involving over 3% of the Fund's assets.14/ Attached to the Form was a schedule which provided certain information about the loan and which incorporated the attached Deed of Trust note and letter setting forth the cure.

The plaintiff contends that this filing does not satisfy ERISA § 413(a)(2)(B) because the attached schedule is misleading as to the value of the collateral for the loan. The schedule states that the value of the collateral based on the actual cost of the land and improvements was $1,933,388. Plaintiff argues that at the time the Trustees filed the Form, they knew the appraised fair market value of the property was no

more than $960,000, and that their failure to disclose this valuation of the collateral renders the filing ineffective for purposes of the statute of limitations defense.

Plaintiff offers no authority for this position. Even if the filing could be considered misleading in reporting the actual cost rather than the appraised value of the collateral, it does not follow that the Form cannot provide constructive knowledge as to any of the violations. The Court concludes that in providing the actual cost rather than the appraised value of the collateral, the Trustees simply deprived themselves of the defense they might have established if they had, inter alia, disclosed that the loan was under-collateralized: that information might have helped to provide constructive knowledge of the breach of

the duty to invest prudently imposed by ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B).

The Court concludes that the Form 5500 filed in August 1977, with the attached schedule and copies of the note and cure letter, is adequate to trigger the three-year statute of limitations as of that date concerning the violations the filing actually disclosed: failure to diversify investments, 29 U.S.C. § 1004(a)(1)(C); failure to follow the plan documents, 29 U.S.C. § 1104(a)(1)(D); engaging in a party-in-interest transaction, 29 U.S.C. § 1106(a)(1)(B); and transfer of assets to a party in interest15/, 29 U.S.C. § 1106(a)(1)(D). The allegations that the original loan, supplemental loan, and/or cure violated these provisions are time-barred, and they will be dismissed. The Form does

not, however, adequately disclose the remaining alleged violations.

The lending Trustees also assert that they have established plaintiff had actual knowledge of the alleged violations more than three years before he filed suit, so that his claims are barred by ERISA § 413(a)(2)(A). The defendants point to plaintiff's contacts with the Department of Labor, his attendance at meetings, documents he received, and admissions he has made. To the extent this evidence tends to show plaintiff's actual knowledge, such knowledge mostly relates to allegations the Court has already found to be time-barred because of the Form 5500 filing, such as the allegation of failure to diversify. Plaintiff admitted in his deposition, however, that as of the time he wrote a letter dated May 31, 1977, he knew that

Trustees Noonan and Bowles were at that time also directors of REBCOR.16/ The Court is satisfied that plaintiff had actual knowledge of this conflict of interest18/ in violation of 29 U.S.C. § 1106(b)(2) more than three years before he filed this action, and this allegation is also time-barred. Wesley v. International Harvester Co., No. 2-C 78-4040, slip op. at 9 (W.D. Iowa Oct. 9, 1980).

Plaintiff has also admitted in his deposition that he knew the appraised value of the property in 1977.18/ He did not, however, recall whether at that time he also knew the principal amount of the loan. Thus, it is not clear whether he knew the loan was under-collateralized. And even if he was aware of that fact, under-collateralization of a loan does not, by itself, establish a breach of the fiduciary duty to invest prudently. The

defendants have not established plaintiff had actual knowledge of the alleged breach of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B), more than three years before he filed this action.

IV. Violations

As to the remaining allegations, the Court concludes plaintiff has proved by a preponderance of the evidence that the lending Trustees and Zahn violated specific provisions of ERISA. He has not in this regard carried the burden as to former Trustees Noonan and Bowles or the current Trustees. On the other hand, the current Trustees have established the one part of thier allegations that survived the statute of limitations defense. See note 12 supra and accompanying text.

A. Lending Trustees and Zahn.

The Court is satisfied that in making both the original and supplemental

loans, the lending Trustees and Zahn violated 29 U.S.C. § 1104(a)(1)(A)(i) by not performing their duties for the exclusive purpose of providing benefits to participants and their beneficiaries. Proving purpose or intent is always difficult, and the Court must rely on circumstantial evidence and reasonable inferences to reach its conclusion that the fiduciaries were attempting to also satisfy the desires and needs of the Local.19/ While that purpose is not evil or dishonest, it is not the exclusive purpose to which ERISA fiduciaries must dedicate their efforts. The fiduciaries did not hold the Local's proposal for a loan at arm's length and compare it to other available investments, but instead did their best to accommodate the Local's needs. Cf. Marshall v. Kelly, 465 F.Supp. 341, 350 (W.D. Okla. 1978)

(finding violation of this section by the making of "sweetheart" loans).

The Court is satisfied as well that the lending Trustees and Zahn did not exercise the prudence required by 29 U.S.C. § 1104(a)(1)(B) in making the original and supplemental loans. The plaintiff has set forth a litany of actions the fiduciaries did not take in the course of making the loans, including properly appraising the proposed building, investigating the borrower's financial resources, evaluating the likely rental income to be derived from the building, taking an assignment of rents, requiring sureties on the loan, and requiring a principal repayment schedule. The Court cannot say that failure to take any of these steps, standing alone, would constitute such imprudence as to violate a fiduciary's duty. These omissions

together do, however, constitute such neglectful practice that the Court cannot conclude a prudent investor in similar circumstances would have acted in the same manner. Indeed, the Court is satisfied otherwise. Cf. Donovan v. Mazzola, 2 Empl. Ben. Cas. (BNA) 2115, 2133-35 (N.D. Cal. 1981) (this section violated by loans made without following standards of "prudent and informed mortgage lenders"); Marshall v. Glass/Metal Ass'n and Glaziers & Glassworkers Pension Plan, 507 F.Supp. 378, 384 (D. Hawaii 1980) (this section violated by loans made without following procedures of "prudent lender").

Had the fiduciaries investigated properly, they most likely would have found that the property would be worth less than the amount of the loan, that REBCOR would have no other assets to

which the Fund could look for repayment of the loan, that the Local was not legally obligated to supply REBCOR the funds with which to make payments on the loan, and that the rental income would not be adequate to pay the debt service on the loan. Indeed, as the Court has heretobefore made reference, Zahn in February 1974 advised the Local membership that the anticipated rental income would be inadequate to service the mortgage. Thus, the failure to investigate led directly to the problems the Fund has experienced with regard to the loan.

Finally, there can be little doubt that in serving as Trustees and administrator of the Fund, respectively, while also serving as directors of REBCOR, Nash, Van Fossen, and Zahn violated 29 U.S.C. § 1106(b)(2). Borrowers and lenders constitute a paradigm instance of

parties whose interests are adverse. "Fiduciaries acting on both sides of a loan transaction cannot negotiate the best terms for either [party]." Cutaiar v. Marshall, 590 F.2d 523, 530 (3d Cir. 1979) (emphasis in original) (finding violation of ERISA § 406(b)(2)).

The plaintiff has not established that the lending Trustees, Zahn, or any other Trustee ever knew a co-fiduciary had committed a breach of fiduciary duties. It follows that none of the defendants are liable under 29 U.S.C. § 1105(a)(1), which makes a fiduciary liable "if he participates knowingly in, or knowingly undertakes to conceal" a co-fiduciary's breach (emphasis added). Similarly, a fiduciary is liable under 29 U.S.C. § 1105(a)(3) only if he or she knows of a co-fiduciary's breach and fails to remedy it. Absent such establi-

shed knowledge, the defendants cannot be liable. The Court is loath to encourage ignorance, and the Court feels strongly that in many instances at least some of the fiduciaries should have known of the breaches and taken steps to remedy them. The evidence before the Court, however, does not adequately establish the required knowledge.

B. Noonan, Bowles, and current Trustees.

The violations plaintiff has proved all concern the initial and supplemental loans. The lending Trustees and Zahn are the defendants liable for these violations. To determine whether these defendants share liability with the other defendants, the Court must examine the remaining allegations, even though proving a single violation by a single defendant might in theory entitle plaintiff to the relief he seeks. For the reasons

which follow, the Court concludes that the remaining defendants are not liable. These defendants were faced with circumstances that were fundamentally different from those of their co-fiduciaries. A fiduciary for a financial entity that has almost all of its assets tied up in an under-collateralized loan to a borrower with little income simply does not have the same options and considerations as a fiduciary for a financial entity that has nearly one-and-one-half million dollars waiting to be invested in whatever manner the fiduciaries choose.

Again, plaintiff has set forth a litany of actions not taken by the Trustees who succeeded the lending Trustees. In addition to some of the actions not taken by the lending Trustees, these defendants did not seek to raise the interest rate, foreclose on the notes,

seek guidance from an investment manager, etc. No doubt some of the named actions might have been beneficial. The Court cannot say that the Trustees have been as diligent or as imaginative in dealing with the loan as they perhaps could have been. In particular, the Trustees might well have successfully induced REBCOR to begin repaying the principal earlier and in greater amounts than was done. Fairness requires, however, that such a possibility be labeled for what it is--speculative. The Court cannot, on the evidence before it, conclude that the Trustees have been so lax in their duties as to violate ERISA's prudence standards or to indicate they were not acting for the exclusive purpose of providing benefits.

The only way the Trustees could have diversified the plan's investments as

required by 29 U.S.C. § 1104(a)(1)(C) and the Virginia Prudent Man Statute incorporated into the Trust documents would have been to divest the Fund of the loan. The evidence before the Court indicates that the Fund would have suffered a greater loss through such divestiture than by retaining the loan and persuading REBCOR to make such payments as were possible. The Court concludes that the Trustees' failure to divest the Fund of the loan so far has been clearly prudent, 20/ so that the failure to divest has not violated 29 U.S.C. § 1104(a)(1)(C),(D).

Finally, plaintiff has offered no authority by which the Court could find that either the 1980 waiver of penalties or the continuing failure to raise interest rates could constitute a tranfer of assets within the meaning of 29 U.S.C. § 1106(a)(1)(D), which proscribes the

transfer of assets to a party in interest. The Court declines to give such a novel interpretation to this common sense term and declines to impose liability based on plaintiff's notion of economic reality. _Cf._ _Marshall_ v. _Kelly_, 465 F.Supp. at 351 (finding violation of this section by transfer of tangible assets).

C. _Cross-claim defendants_.

The part of the cross-claim that is not barred by the statute of limitations concerns the administration of the loan from November 4, 1976 through January 17, 1977. _See_ note 12 _supra_ and accompanying text. During that period, as for some time before, REBCOR failed to make interest payments. The evidence indicates the Trustees had no reason to suspect REBCOR was not making the payments, and the Court discerns no basis for

finding them liable for the manner in which the delinquent interest built up.

This part of the cross-claim thus pertains only to Zahn. The parties have stipulated that Zahn "was delegated the duty to receive and record REBCOR payments, and to report to the trustees if any difficulties arose." The current Trustees allege that in failing to properly perform such duties, Zahn breached the fiduciary duty set forth in ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B). Zahn responds that he was not a fiduciary with respect to these duties, as the term is defined in ERISA § 3(21), 29 U.S.C. § 1002(21).

Under the statutory definition, "a person is a fiduciary with respect to a plan to the extent...(iii) he has <u>any</u> discretionary authority or discretionary responsibility in the administration of

such plan" (emphasis added).21/ The duty to report any difficulties concerning REBCOR's interest payments included the authority and responsibility for deciding what constituted "difficulties," which is a matter of discretion. A responsible administrator might not wish to trouble the Trustees if a payment came in a day or two late, but would have to decide at some point that the failure to pay interest properly had become serious enough that the Trustees should know of it. The Court has no difficulty in concluding that Zahn permitted the delinquencies to build up over a much longer period of time and to a much greater extent than a prudent person in his position would have.

V. Additional Defenses

The lending Trustees and Zahn have raised various defenses in addition to

the statute of limitations defense and the contention that Zahn was not a fiduciary. The Court finds each of these additional defenses to be without merit.

Certain of the lending Trustees assert that the Court is not to overturn the decisions of the Trustees unless it finds them to have been arbitrary and capricious. That standard applies only to review of determinations as to eligibility for benefits. See, e.g., Seafarers Pension Plan v. Sturgis, 630 F.2d 218 (4th Cir. 1980). The standard for review of the fiduciaries' performance of their duties is set forth in ERISA § 404, 29 U.S.C. § 1104, and the Court need not look beyond the terms of the statute in reviewing the manner in which the Trustees and Zahn discharged their fiduciary duties.

The lending Trustees also assert

that pursuant to ERISA § 414(c)(1), 29 U.S.C. § 1114(c)(1), the original loan was exempt from the prohibited transaction coverage of ERISA § 406, 29 U.S.C. § 1106.22/ Under § 414(c)(1), a party-in-interest transaction may be exempt if, *inter alia*, a binding contract was in effect on July 1, 1974. As of that date, however, all the instant parties had agreed to do was to negotiate concerning a loan. The evidence falls far short of establishing a binding enforceable contract as of that date.23/

Finally, the Trustees contend they cannot be liable since they were relying in good faith on the advice of counsel. They have offered no authority to show such reliance constitutes a complete defense. The Court considers the defendants' reliance on the advice of counsel to be simply one of the factors relevant

to determining whether they acted with the prudence required by ERISA § 404, 29 U.S.C. § 1104. Even if the fiduciaries interpreted the advice of counsel to mean that the loan would not violate federal law,24/ they were nonetheless bound to evaluate the proposed investment for its merit in helping provide benefits to the beneficiaries and participants. The Court remains firm in its conclusion that the fiduciaries did not make this evaluation in a prudent manner.

VI. Relief

Pursuant to ERISA § 409(a), 29 U.S.C. § 1109(a), a fiduciary is personally liable to the plan for any losses resulting from breaches of the fiduciary's duties and is subject to other equitable relief or remedial relief, including removal from office. Under this provision, the lending Trustees and

Zahn are jointly and severally liable for the losses.25/ See Freund v. Marshall & Ilsley Bank, 485 F.Supp. 629 (W.D. Wis. 1979). There appears to be no way to monetarily measure certain aspects of the injury caused by the breaches. For example, the Fund has been deprived of economic opportunities by having virtually all of its assets tied up in this inferior investment, but the parties have offered no means of measuring the loss of such opportunities caused by this concrete albatross. One type of loss, however, can be measured: the Fund today holds an investment whose value is significantly less than the value prudent investments would bear. That difference in value represents the damage the Fund has suffered.26/

Plaintiff has submitted affidavits and reports by experts setting the value

of the note as of February 28, 1982 at $1,860,000. This valuation represents the sum of the income the note had produced as of that date, $985,000, and the value plaintiff's experts give the security for the note, the Parham Road property, $875,000. Simply stated, this valuation places at zero the value of REBCOR's promise under the note to pay interest and to repay the principal.27/ By taking into account the value of the property, it is, however, based on REBCOR's one asset from which REBCOR could generate the funds to make such payments. The only evidence before the Court on this issue indicates that this method of valuing the note is the one an investor would use. Since the Court's purpose is to evaluate the note as an investment, the Court accepts this valuation.

In challenging the valuation, the defendants have only challenged the method by which plaintiff's experts valued the Parham Road property. Plaintiff's experts used the "income" approach or "economic" approach, capitalizing the expected income stream from the building. Some of the defendants contend that the proper valuation of the building is $1,250,000, which is the amount for which the current Trustees' expert estimated the property could be sold "through aggressive marketing to potential owner-occupants."28/

The Court professes to no expertise in the area of real estate valuation. The Court has no means of evaluating whether an "income" approach, "market value" approach, "cost" approach, "liquidation" approach, "aggressive marketing to targeted buyers" approach, or some

combination of these approaches would come closest to producing, in some sense, a "true" valuation of real estate. But the evidence before the Court indicates that an investor would apply the "income" approach, and there isn't anything before the Court to suggest that approach is inherently unreliable. The Court concludes that the calculation of the value of the note as $1,860,000 is accurate.

One of the plaintiff's experts also calculated the value as of February 28, 1982, of two real estate loans considered to be of comparable scope, but better structured, as well as the value as of that date of an investment made solely in certificates of deposit.29/ Each of these values is greater than the $1,860,000 value of the REBCOR notes. The expert suggests averaging the differences in value and using the resulting

figure, $533,000, as the measure of damages.

The difficulty with the expert's suggested measure is that the plaintiff has given the Court no reason to suppose that the expert's notion of properly structured real estate loans was available to the lending Trustees as an option to the investment they chose. The Court, therefore, will compare the value of the REBCOR notes only with the value of an investment in certificates of deposit, $2,300,800. The difference in value is $440,000; the Court is satisfied that this figure represents the amount by which the Fund has been damaged by the imprudent investment in the REBCOR loans.[30]

The Court finds the other relief plaintiff requests to be inappropriate. In particular, as the Court noted *supra*,

the Court is not satisfied that divestiture of the loan is either necessary or desirable at this time. The prudence of such a move must be continually reevaluated as conditions change. See note 20 supra. The plaintiff's requested relief concerning counsel fees is considered infra.

As for the current Trustees' cross-claim, they have only asserted broadly that the cross-claim defendants are liable for any and all loss resulting from their breaches. They have not established the amount of loss the Fund suffered as a result of Zahn's imprudent administration of the loan and lack of diligence concerning interest payments. Indeed, since all of the current Trustees were in office in 1980 when the penalties for such interest delinquencies were ultimately waived, it is not unreasonable to

suppose they consider the Fund to be now made whole for such delinquencies.

At any rate, no further monetary damages have been established, and the Court is not satisfied that the further relief requested, such as requiring guarantees or additional collateral is appropriate. Such additional relief would amount to double recovery, since the absence of such measures was part of the basis for the valuation of the REBCOR notes. See note 27 supra and accompanying text. Since the current Trustees have failed to establish any recoverable damages on their cross-claim, see also part VII infra, judgment will be entered in favor of the cross-claim defendants. The current Trustees' contentions in regard to counsel fees remain to be considered.

VII. Counsel Fees

This case, despite its facade, is not about fiduciary duties or providing health and welfare benefits or prudent investments or conflicts of interest. This case is about counsel fees. The Court has set the amount of damages at $440,800; the Court has no doubt that the total legal fees generated by this action already amount to some obscene multiple of that figure. From the beginning, this case has been characterized by excessive representation.31/ The majority of the parties, including the plaintiff, have found it necessary to be represented by two or more teams of lawyers. Now each of the parties seeks to have someone else pay for such representation.

Unfortunately, the Court cannot dispose of all of these claims entirely on the present record. For example, certain

defendants have filed third-party complaints against Aetna Life and Casualty Company and The Standard Fire Insurance Company asserting that pursuant to a policy of fiduciary insurance,32/ the third-party defendants had a duty to defend them in this action. These third-party complaints have, in effect, been severed from the principal action. See note 1 supra. The Court can, however, consider certain of the contentions.

Pursuant to ERISA § 502(g), 29 U.S.C. § 1132(g), the Court will allow plaintiff to collect reasonable counsel fees from the lending Trustees and Zahn. Applying the standard set forth in Tenneco Inc. v. First Virginia Bank, No. 82-1158, slip op. at 4 (4th Cir. April 5, 1983)33/ the Court finds as follows: (1) these defendants are culpable in causing significant loss to the Fund; (2) their

ability to pay fees is unknown to the Court; (3) there is reason to hope an award of attorney fees in this instance will deter others; (4) most significantly, the plaintiff has sought to benefit the Fund as a whole (though the Court is less convinced of the altruistic motives of plaintiff's counsel); and (5) the plaintiff is entitled to relief on the merits. The plaintiff will be directed to confer with these defendants in an attempt to settle on an amount for such fees. Of course, plaîntiff will not be allowed to recover counsel fees for any duplicative work performed by his various teams of lawyers or for work performed in pursuit of his unsuccessful claims.

The current Trustees have requested, as an element of the damages sought in their cross-claim, that the former Trustees be made to bear the costs of

defending this litigation. Of course, the cross-claim established liability only against Zahn. But at any rate, the current Trustees have not shown that any breaches of duty proximately caused the litigation to transpire. The Court cannot surmise what motivated the plaintiff to file suit. But from the evidence, it appears at least equally likely plaintiff filed suit in frustration after receiving high-handed treatment from the current Trustees when he made inquiries about the REBCOR loan.

In accordance with the discretion provided the Court in ERISA § 502(g), 29 U.S.C. § 1132(g), the Court will not award counsel fees to the current Trustees. As to plaintiff's unsuccessful claim against them, they have not so much prevailed as eluded liability. As to their cross-claim against the lending

Trustees and Zahn, they have failed to establish a right to any relief, and they certainly have conferred no benefit upon the Fund beyond what the plaintiff has brought about. Applying the Tenneco Inc. standard, see note 33 supra, to the plaintiff's claims against the current Trustees in the principal action, (1) the Court finds no reason to conclude that the plaintiff brought his action against the current Trustees in bad faith; (2) he apparently has little ability to pay fees; (3) his efforts do not call for deterrence; (4) the current Trustees sought to benefit the entire Fund in opposing plaintiff only to the extent he sought remedies they believed would harm the Fund, but they also sought to protect their own positions; and (5) the merits of the parties' positions have been resolved in favor of the current Trustees.

On balance, no counsel fees are called for. To the extent the Tenneco Inc. factors apply to the cross-claim, they are satisfied by the plaintiff's recovery of counsel fees in the principal action.

Finally, the plaintiff has requested, as part of his relief, that the defendants be required to reimburse the Fund for any legal representation the Fund has provided them and that the Court order that no defendant be indemnified by the Fund for his costs of defending in this action. The record does not reflect whether the Fund has, in fact, paid for any such representation.34/ The Court will direct the parties to submit evidence as to any such payments and to submit arguments and supporting authorities as to whether such relief is appropriate.

An appropriate order will issue.

FOOTNOTES

1/ The stipulations do not apply to the third-party action and do not extend to the relevance of any fact or document included.

2/ The other party to the agreement establishing the Fund is the Capitol Division, Virginia Chapter, National Electrical Contractors Association ("NECA"). The Fund covers the employees of NECA contractors. NECA appoints three Trustees, and the Local appoints the other three.

3/ Defendant Van Fossen ceased to serve as a Trustee in August 1976, then served again as Trustee from June 1981 until October 1981.

4/ One of the six Trustee positions is currently vacant.

5/ At no time has any party suggested any theory under which any Trustee could be liable for any actions other than those taken in his capacity as Trustee. Nonetheless, the majority of the Trustee defendants have employed separate counsel to represent them in their individual capacities. These attorneys have merely further developed the defenses available to the defendants as Trustees. Of course, parties are free to hire as much legl representation as they deem appropriate, but they may, as in the instant case, anticipate problems if they subsequently seek to have the opposing parties pay for such representation.

6/ The Declaration of Trust required at

least two Trustees appointed by the Local and two appointed by NECA to be present to constitute a quorum at a Trustees' meeting. Only one Trustee appointed by NECA was present at the June 7, 1974 meeting, along with Zahn and the three Trustees appointed by the Local.

7/ Zahn received the following letter dated October 31, 1974 from the Fund's legal counsel:

> Dear Mr. Zahn:
>
> This is in further response to your inquiry regarding the proposed loan from the trust to the Richmond Electrician's Building Corporation, a wholly-owned subsidiary of the local. You indicate that as evidenced by minutes of the trustees of the trust, the trust had committed to make the loan before July 1, 1974, which committment had been relied on by Richmond Electrician's Building Corporation and by the local in its construction of the building.
>
> Section 414(c)(1) of the Employee Retirement Income Security Act of 1974, relating to the effective date of the new prohibited transaction rules, provides as follows:
>
> . . . .
>
> While there are no regulations or other administrative interpretations under the above quoted provision, the phrase "binding contract" may be interpreted to include a situation

such as that existing as the result of the action of the trustees of the trust before July 1, 1974, in reliance on which action has been taken by the Richmond Electrician's Building Corporation. If this interpretation is finally adopted, then the making of the loan would not constitute a prohibited transaction under the new rules until June 30, 1984, provided the other requirements of Section 414(c)(1) of the Act are met.

It should be noted that Section 414(c)(1) requires that the transaction not violate the prohibited transaction rules of existing law (Section 503(b) of the Internal Revenue Code of 1954) as well as that the transaction must be on terms as favorable as an arm's-length transaction. For your guidance in structuring the transaction, I am enclosing a copy of Section 503(b) of the Internal Revenue Code of 1954. However, I am not sure that Section 503(b) of the Code adds anything to the arms-length requirement and it might be argued that the corporation is not so related to the trust as to give rise to the application of Section 503(b).

With best regards, ...

8/ By this time, defendant Bowles had replaced defendant Cook as Trustee; Noonan had replaced Nash; Jernigan had replaced Van Fossen; Wilson had replaced Koch; and Baker had resigned as Trustee, but had not been replaced.

9/ Plaintiff disputes that the payments were in fact timely made. Defendants contend that at least some of the payments appear on the books to have been late only because Zahn was late in recording them. Plaintiff has not satisfied the Court by a preponderance of the evidence that REBCOR violated the terms of the cure in such a way that the Trustees should not have waived the penalties.

10/ By the June 16, 1977 meeting at which the Trustees agreed to the cure, defendant Parker had taken the Trustee position defendant Baker had vacated, so the Board consisted of Accardi, Bowles, Jernigan, Noonan, Parker and Wilson.

11/ § 1113. Limitation of actions

> (a) No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of--
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on

> which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this subchapter;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

The defendants seek to take plaintiff at his word when he asserts "The time is long overdue that these violations should be corrected."

12/ The cross-claim allegations concerning administration of the loans involve acts and omissions through January 17, 1977, when Zahn first told the Trustees of the delinquent interest.

13/ The Court finds no merit in the current Trustees' arguments for equitable tolling of the six-year period. The current Trustees attempt to apply the date of the original complaint to toll the statute of limitations, as in American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), where members of a class were able to apply the date on which the named plaintiff first filed for class certification. If the current Trustees' theory were adopted, the statute of limitations would never bar a cross-claim where the original complaint was timely filed, since a cross-claim must arise from the same transaction or occurrence, see Fed.R.Civ.P. 13(g). The instant cross-claim does not present the kind of equitable considerations that

justified tolling the limitation period in American Pipe. Nothing in Crown, Cork & Seal Co. v. Parker, 51 U.S.L.W. 4746 (U.S. June 13, 1983), changes the Court's conclusion as to this issue.

On the other hand, the cross-claim defendants have not established actual or constructive knowledge on the part of the current Trustees so as to reduce the limitations period to three years. See note 14 infra and accompanying text.

14/ It is not clear to the Court what transaction was being reported here. The preparer of the Form 5500 evidently did not consider the 1976 disbursements under the loan to constitute a "transaction," since the Form indicates the Fund was not involved in any "transactions" with a party in interest in 1976. If the Fund filed a schedule with respect to this transaction, as the instructions for this Item 24(a)(v) specify, it was not included in the copy of the filing submitted to the Court as Exhibit 5B.

With regard to constructive knowledge applicable to the cross-claim, the Court notes that while the Form disclosed that the loan had become delinquent, it did not disclose the manner in which it had been allowed to become so. The Form thus did not provide constructive knowledge of the alleged breach of fiduciary duty inherent in allowing the delinquency to accrue in the manner it did.

15/ The allegation that the 1977 agreement to waive late penalties constituted a transfer of assets to a party in interest is the only allegation under 29

U.S.C. § 1106(a)(1)(D) that is time-barred; the allegation concerning the actual waiver of penalties in 1980 remains to be considered.

16/ Exhibit 92I, at 333-34.

17/ Plaintiff's admission concerning two of the 1977 Trustees did not indicate that he knew that Nash, Van Fossen and Zahn had had a similar conflict of interest at the time the loans were approved. The allegations concerning these defendants remain to be considered. He also did not indicate that he was aware Trustee Jernigan was in 1977 also a member of the Local's executive board. The plaintiff has not satisfied the Court, however, that Jernigan was laboring under a conflict of interest with respect to the loan administration; he has not shown that the executive board was sufficiently involved with the loan for Jernigan's membership on it to cause a violation of ERISA § 406(b)(2), 29 U.S.C. § 1106(b)(2).

18/ Exhibit 92I, at 287.

19/ That serving the needs of the Local is not necessarily the same as serving the needs of participants and beneficiaries is clear from the facts of this case: plaintiff is no longer a member of the Local, but remains a participant in the Fund. Presumably many, if not all, of the beneficiaries would also not be members of the Local.

20/ The Court intimates no opinion as to whether continuing to hold the loan until the notes comes due on June 30, 1984

would be prudent. That determination depends, inter alia, on further principal payments by REBCOR, prevailing real estate prices, rental incomes, and perhaps the health of the construction industry in the area, as well as other now unforeseeable conditions.

21/ The plain language of the statute seems to suggest that once a person is a fiduciary "with respect to a plan" in any capacity, the fiduciary responsibility extends to all functions performed for the plan, however ministerial or discretionary. But see Fulk v. Bagley, 88 F.R.D. 153, 161-63 (M.D.N.C. 1980). The Court need not, however, decide whether such a blanket fiduciary status exists, because the Court concludes Zahn exercised discretion with respect to each function for which liability attaches. In the making of the loans, Zahn exercised discretion at least in his capacity as a member of the committee of three that was to evaluate the proposed loan and recommend to the Trustees whether or not they should extend the loan. See text accompanying note 6 supra.

22/ Even if this defense were successful, it would only apply to the conflict-of-interest violation of Nash, Van Fossen, and Zahn, since the other § 406 allegations are barred by the statute of limitations.

23/ In a related contention, the Trustees assert the transaction took place before ERISA's January 1, 1975 effective date, established in ERISA § 414. The Deed of Trust note on the original loan was executed on January 23, 1975. None

of the transactions the Court has found to constitute violations occurred before January 1, 1975. And post-1974 violations are covered by ERISA even if "their roots [can] be traced to an event prior to the effective date of ERISA." Marshall v. Craft, 463 F.Supp. 493, 497 (N.D.Ga. 1978); accord, O'Neil v. Marriott Corp., 538 F.Supp. 1026 (D. Md. 1982).

24/ The current Trustees and the Fund have filed a separate action against the Fund's former legal counsel styled Local 666 Benefit Trust Fund, et al. v. McGuire, Woods & Battle, et al., Civil Action No. 82-0221-R. Some of the former Trustees and Zahn have moved to file third-party complaints in this action against the same former legal counsel. The motions will be granted, but the claims will be consolidated for trial with the existing action against McGuire, Woods & Battle et al. The Court's conclusions in the instant matter have no bearing on that action, and the Court intimates no opinion as to the merits thereof.

25/ The evidence does not establish any means by which any loss caused by the conflict of interest of Nash, Van Fossen, and Zahn can be separated from the loss caused by the other fiduciaries' breaches of duty. The evidence thus indicates that each of the lending Trustees and Zahn are equally responsible for the losses.

26/ There is no need to wait until the note matures on June 30, 1984 or to liquidate the note to determine its value.

The Court will not retain jurisdiction of this action, as some parties have suggested, to see whether the current assessments of value prove accurate. Cf. Freund v. Marshall & Ilsley Bank, 485 F.Supp. at 642-43 (losses realized and ascertainable before liquidation of investment).

27/ In this manner, the valuation takes into account some of the problematic elements of the loan that resulted from the breaches: deficiency of collateral, lack of any guarantee or other commitment from the Local, lack of a principal repayment schedule (binding or even suggested), history of problems in collecting interest, etc.

28/ Affidavit of Linwood A. Aron, exhibit 96, at 6 (Dec. 9, 1982).

29/ In calculating this present value, the expert did not compute the amount of income that could have been generated by reinvesting the interest from these certificates. However, in calculating the present value of the REBCOR note, the expert also did not compute the amount of income that could have been generated by reinvesting the interest and principal payments received. In each instance, the expert assumed such payments would be applied to the Fund's current needs. The two figures thus can be compared with no distortion.

30/ The figure need not be adjusted for the amount of any principal payments made since February 28, 1982 because the comparison with the alternative investment was made as of that date. The Fund

apparently has also suffered a loss in the amount of $159.25, the amount of interest it had to pay on borrowing made necessary because of the amount of the Fund's assets tied up in the REBCOR loan. Because this element is so minor, and because the $440,800 figure is necessarily based on estimates and inherently uncertain appraisals, the Court deems this element to be included in the $440,800 figure.

31/ At times, the excessive representation has been nearly as comical as wasteful. For example, one defendant, rather than simply joining in the memorandum filed by another defendant who had the same interests, filed a virtually identical memorandum. Unfortunately, in one place he slipped and failed to substitute his own name for the other defendant's. The Court cannot imagine a reason for filing this memorandum other than to generate legal fees. See also note 5 supra.

The courtroom was so fully occupied by lawyers at the hearings that, if the Court may borrow an expression without being able to name the source, when one lawyer would sneeze, the "Gesundheits" would take up six pages of transcript.

The Court will, at the appropriate time, consider invoking the sanctions provided for in 28 U.S.C. § 1927. Fairness mandates an expression by the Court that at least some of the efforts expended by certain of the counsel were made necessary by the unnecessary efforts of some of their brethren.

32/ The policy is alleged to have covered the fiduciaries from May 25, 1977 to May 25, 1978. Since the Court has found none of the defendants liable for any actions taken during that period, there should be no dispute concerning any claims for indemnity under the policy.

33/ In Tenneco Inc. the Fourth Circuit adopted the test for awarding counsel fees pursuant to ERISA § 502(g) that was set forth in Iron Workers Local #272 v. Bowen, 624 F.2d 1255, 1266 (5th Cir. 1980), under which the Court is to consider

> such factors as the following: (1) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of attorneys' fees; (3) whether an award of attorneys' fees against the opposing parties would deter other persons acting under similar circumstances; (4) whether the parties requesting attorneys' fees sought to benefit all participants and beneficiaries of an ERISA plan or to resolve a significant legal question regarding ERISA itself; and (5) the relative merits of the parties' positions.

Id. (footnote omitted).

34/ In general, the parties have reserved the issues relative to counsel fees.

UNITED STATES COURT OF APPEALS
for the Fourth Circuit

No. 83-1706(L)

Robert J. Davidson, Jr.,
Appellee,

v.

John L. Cook, et al.,
Appellants,

and

Joseph Accardi, et al.,
Defendants

v.

McGuire, Woods & Battle, et al.,
Third-Party Defendants.

No. 83-1707

Robert J. Davidson, Jr.,
Appellee,

v.

Joseph Accardi and Reginald E. Baker,
Appellants,

and

John L. Cook, et al.
Defendants

v.

McGuire, Woods & Battle, et al.,
Third-Party Defendants.

No. 83-1708

Robert J. Davidson, Jr.,
Appellee,
v.

John A. Koch,
Appellant,
and

John L. Cook, et al.
Defendants
v.

McGuire, Woods & Battle, et al.,
Third-Party Defendants.

No. 83-1709

Robert J. Davidson, Jr.,
Appellee,
v.

Shirley A. Zahn, etc.,
Appellant,
and

John L. Cook, et al.
Defendants
v.

McGuire, Woods & Battle, et al.,
Third-Party Defendants.

No. 83-1710

Robert J. Davidson, Jr.,
Appellee,

v.

Joseph R. Jernigan, et al.,
Appellants,

and

John L. Cook, et al.
Defendants

v.

McGuire, Woods & Battle, et al.,
Third-Party Defendants.

Entered: April 11, 1984

PER CURIAM:

These consolidated appeals present issues that have their genesis in the application of the Employee Retirement Income Security Act of 1974 (ERISA) to the acts of certain officials of the Benefit Trust Fund of Local 666 of the International Brotherhood of Electrical Workers (Fund) in connection with loans from said Fund to Richmond Electricians Building Corporation (REBCOR). Plaintiff, a participant in the Fund since 1969, filed suit on behalf of the Fund for alleged violations of ERISA by former

or lending trustees and current trustees and a former administrator for the Fund for their respective roles in making the loan, administering the loan, a 1977 cure of a default, and the continued retention of the loan. In addition to seeking removal of the Fund's entire board of trustees, plaintiff sought recovery of any and all losses to the Fund resulting from the REBCOR loan. The current trustees, in an effort to preserve the Fund's remedies in the event the court applied the three-year statute of limitations to plaintiff, cross-claimed against the lending trustees and the former administrator asserting various claims, many of which are identical to those asserted by the plaintiff.

Upon submission of the record, including the stipulations of the parties, the District Court, in a comprehensive

and well-reasoned opinion, determined that the lending trustees and the former administrator Zahn violated certain provisions of ERISA, particularly by failing to perform their duties for the exclusive purpose of benefiting Fund participants1/ and by acting imprudently in making the original and supplemental loans.2/ Three of the defendants, Nash, Van Fossen and Zahn, were found to be in violation of ERISA, 29 U.S.C. § 1106(b)(2), for acting on behalf of both the Fund and REBCOR with respect to the making of the loans. All other allegations were dismissed and judgment was entered for the former trustees and Zahn on the cross-claim.

The district court assessed damages in the amount of $440,800 in accordance

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1/ 29 U.S.C. § 1104(a)(1)(A)(i).

2/ 29 U.S.C. § 1104(a)(1)(B).

with ERISA § 409a, 29 U.S.C. § 1109(a), which makes a fiduciary personally liable to ar employee benefit plan for any losses resulting from breaches of the fiduciary's duties.

Pursuant to ERISA § 502(b), 29 U.S.C. § 1132(g), which permits reasonable attorney fees and costs to either party, the court awarded reasonable counsel fees to plaintiff from the lending trustees and Zahn. Exercising its discretion under § 1132(g), the court declined to award fees to the current trustees.

Timely appeals were filed by the parties respectively. Zahn appeals from the court's finding that he was a fiduciary as defined in 29 U.S.C. § 1002(21) of the Act, and by acting in such capacity breached his duties to the Fund, in violation of ERISA. The former or

lending trustees allege error in the court's failure to find <u>all</u> of plaintiff's claims time-barred by ERISA § 413, 29 U.S.C. § 1113. Pursuant to said provisions, a six-year statute of limitations begins to run from the date of the breach or violations, except in the event of fraud and concealment when it begins to run from the date of the discovery of the breach or violation. Absent fraud or concealment, upon a showing that plaintiff has actual or constructive knowledge of the breach or violation, the six-year statute of limitations can be reduced to three years, running from the time plaintiff first had knowledge of said breach.

The District Court found the "last action which constituted part of the breach or violation" to be the last disbursement of funds pursuant to the loan in March 1976. The former trustees argue

that the court erred in not applying the shorter three-year statute of limitations to plaintiff because he had both actual and constructive knowledge of the loan by virtue of the filing of Form 5500, the "Annual Return/Report of Employee Benefit Plan" with the Department of Labor. Form 5500 disclosed that the Fund held a party-in-interest investment in a mortgage which had increased from $1,078,531 to $1,413,803 during 1976; that the Fund held a loan which was in default as of the end of 1976; and that the Fund had engaged in transactions which involved over 3% of the Fund's assets. The District Court determined that the filing of said Form, which was open for public inspection, was sufficient to establish that plaintiff had constructive knowledge of the defendants' actions as of August 1977, and was accordingly barred from

asserting certain of the claims, including failure to diversity investments, 29 U.S.C. § 1104(a)(1)(C); failure to follow the plan documents, 29 U.S.C. § 1104(a)(1)(D); engaging in a party-in-interest transaction, 29 U.S.C. § 1106(a)(1)(B); and the transfer of assets to a party in interest, 29 U.S.C. § 1106(a)(1)(D).3/ The lending trustees attack the court's finding that said form did not adequately disclose information relating to plaintiff's remaining allegations upon which the judgment of the court rested. The former or lending trustees also cite as error the court's

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3/ The Court further determined that plaintiff had actual knowledge of most of the same claims found time-barred by constructive knowledge under Form 5500. However, the Court determined that plaintiff had actual knowledge of the fact that trustees Noonan and Bowles were also directors of REBCOR as of May 31, 1977, and dismissed said claim as time-barred.

finding that their reliance on the advice of counsel to protect their actions was but one factor to be considered in determining whether fiduciaries acted prudently as required by ERISA § 404, 29 U.S.C. § 1104, in investing the Fund's money.

The former or lending trustees, Nash and Van Fossen, assert as error the court's holding that they were in clear violation of § 406(b)(2) of ERISA, 29 U.S.C. § 1106(b)(2), by operating on "both sides of the loan" in serving as both trustees of the Fund and officers of REBCOR, a title-holding entity. Finally, the former trustees allege as error the rationale of the court below in its calculation of damages based upon the application of the pertinent provisions of the Act, as well as the court's conception of

sound business practices.[4]

The current trustees alleged as error the action of the trial court in applying the six-year statute of limitations to their cross-claim against the former trustees for breach of their fiduciary duties and rejecting their defenses to said statute of limitations. The current trustees also complain of the district court's failure to include as part of the damages to the Fund the attorney fees and legal expenses incurred

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[4] Relying upon the plaintiff's experts' testimony, the court fixed the value of the REBCOR note as of February 28, 1982 at $1,860,000, being the sum of the income the note had produced as of that date, or $985,000 and the value placed on the Parham property, the security for the note, or $875,000. The court then compared the value of the note so found with what the Fund would have realized had it invested the sums loaned to REBCOR in 90-day certificates of deposit determined by the court to be $2,300,800 ($1,413,800 plus interest of $887,000), and concluded thereform that the Fund suffered a loss by the imprudent investment of $440,800.

by them in their successful defense of this action.

In view of the trial court's thorough treatment of each of the issues presented by the various parties, with which we agree, we deem further discussion thereof unwarranted. Accordingly, we affirm for the reasons stated in the district court's opinion in Davidson v. Cook, 567 F.Supp. 225 (E.D. Va. 1983).

A F F I R M E D

(2) (1)

Nos. 84-229, 84-5052

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JOSEPH ACCARDI, *et al.*,
Petitioners,

v.

ROBERT J. DAVIDSON, Jr., etc., *et al.*,
Respondents.

SHIRLEY A. ZAHN, Administratrix, etc.,
Petitioner,

v.

ROBERT J. DAVIDSON, Jr., etc., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT ROBERT J. DAVIDSON, JR.'S BRIEF IN OPPOSITION

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September 12, 1984

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STATUTORY PROVISIONS INVOLVED

The statutory provisions of Title 29, United States Code, quoted by petitioners contain typographical errors and are, therefore, reproduced here.

§ 1113. Limitation of actions

(a) No action may be commenced under this subchapter with respect to a fiduciary's breach of any

responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of —

> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secretary under this subchapter;

except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

§ 1002. Definitions

For purposes of this subchapter:

* * *

(21)(A) . . . a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. . . .

* * *

COUNTERSTATEMENT OF THE CASE

1. *Proceedings in the Courts Below*

The Complaint was filed on October 19, 1981, by Robert J. Davidson, Jr. ("Davidson"), who has been a participant in Local 666 Benefit Trust Fund ("the Fund") since 1969. Claims were brought primarily under the Employee Retirement Income Security Act of 1974 ("ERISA"). 29 U.S.C. § 1001 *et seq.* Davidson sought to protect the Fund from monetary losses caused by improper loans made to Richmond Electricians' Building Corporation ("REBCOR"), a wholly owned subsidiary of Local Union 666, International Brotherhood of Electrical Workers (the "Local" or "Local 666"). Named as defendants were certain former and current fiduciaries to the Fund.

The case was submitted for decision to the district court on the basis of a stipulated record including a lengthy Stipulation of Facts and over 3,000 pages of Stipulated Exhibits. With leave of the district court, Davidson moved, and the court granted his motion, to amend his complaint to conform to the evidence. [Appendix to Joint Petition of Accardi, *et al.* ("App."), p. la.]

The district court entered judgment against six former trustees of the Fund (the "trustees" or the "lending trustees") and Shirley A. Zahn, administratrix of the estate of Willie Zahn ("Zahn"), former administrator of the Fund (collectively referred to as the "lending fiduciaries"). The lending fiduciaries were found personally liable in the amount of $440,800 plus prejudgment interest,

costs and attorneys' fees. (App. pp. 1a-3a.)

With respect to the claims against the other defendants, the district court found that two other former fiduciaries and the current trustees to the Fund had "eluded" liability. The district court dismissed a cross-claim filed by the current trustees against the lending fiduciaries. (App. pp. 3a, 57a.)

The court of appeals unanimously affirmed the decision of the district court in an unpublished opinion, deeming further discussion of the issues unwarranted. (App., p. 83a.)

2. *Background*

The Fund was established in 1968 by Local 666 and the Virginia Chapter, National Electrical Contractors Association ("NECA") for the purpose of providing health and welfare benefits for NECA contractor employees and their families. The Fund is managed by six trustees, three appointed by Local 666 and three appointed by NECA.

Eligible participants and beneficiaries of the Fund include: (1) employees, generally electricians, working under a collective bargaining agreement between Local 666 and NECA; (2) certain non-union employees; (3) dependents of covered employees; (4) retired employees; (5) disabled employees; and (6) surviving spouses and orphans of deceased employees.

3. *The Lending Transaction and Zahn's Involvement*

In 1971, Local 666 set up a Building Committee to

oversee the purchase of property and construction of a building to house the Local's offices. In September of 1972, Local 666 established REBCOR for the purpose of owning and constructing the building. During the period from September 1972 through the end of 1973, REBCOR purchased property for $137,500 and had architectural plans drawn up for what was proposed to be a $900,000 building.

On April 4, 1974, the REBCOR directors, including lending fiduciaries Nash, Van Fossen and Zahn, received a construction estimate of $1,878,376 for a proposed three story building with two floors of rental space. The REBCOR directors recognized that a substantial increase in Local members' assessments would be required for REBCOR to afford this proposed building.

At Local membership meetings held in March and April 1974, motions to increase working assessments were defeated. On May 2, 1974, the REBCOR directors made a decision to postpone the building because they could not afford it. However, at a Local meeting held the very next day, a motion was adopted to build the building and, when additional money was needed to meet expenses, to come back to the Local members at that time for an assessment increase. Five days later, the REBCOR directors decided to proceed with construction, and on May 23, 1974, without any commitment or contingency for financing, Local/REBCOR president Conley L. Bodsford signed a $1,757,500 construction contract. During this time period, Bodsford and Zahn had met with and been refused a loan by a commerical lending institution.

Zahn held himself out, and was held out by the trus-

tees, as the administrator of the Fund. As the Fund's salaried administrator, Zahn handled the day-to-day management and administration of the Fund. Trustees' meetings, on the other hand, were held four times in 1974, five times in 1975, and three times in 1976. Trustees' meetings were held sporadically until mid-1977. Zahn had a history of handling the investment of Fund reserves prior to the making of the REBCOR investment.

At the trustees meeting held, without a quorum, on the afternoon of June 7, 1974, union trustees Nash, Van Fossen, and Cook and employer trustee Accardi adopted a motion to negotiate a loan with REBCOR, subject to final approval by the full board of trustees. They directed a committee composed of Zahn and trustees Accardi and Cook to review and approve loan documents to be prepared by the Fund's attorneys in order to obtain a complete understanding of their terms and conditions. If the committee of three approved the loan, the entire board of trustees would vote on whether to make it. The note and deed of trust were drafted by the Richmond law firm of McGuire, Woods & Battle in consultation with Zahn.

Construction began sometime between July 5, 1974, and August 2, 1974.

By letter dated October 31, 1974, attorney Carle E. Davis, with McGuire, Woods & Battle, advised Willie M. Zahn of Local 666, IBEW, that the loan would not be a prohibited transaction under ERISA if a reliance theory of the term "binding contract" were finally adopted under § 414(c)(1) of ERISA and if the loan were made at arm's length. The Davis letter was based, in part, on the dual assumptions that the trustees had made

a loan commitment before July 2, 1974, and that REB-COR and the Local had relied on such a commitment.

On December 5, 1974, the Local membership approved an assessment increase, which was less than that increase the REBCOR directors had previously determined was necessary to fund the building project.

At a trustees' meeting on December 13, 1974, attended by all of the trustees, the trustees unanimously passed a motion to lend REBCOR $1 million at a ten percent interest rate, payable monthly. Zahn, who was in attendance, knew that REBCOR would ultimately need to borrow about $1.5 million. Yet, he limited his first request for funds, acting as REBCOR's spokesman, to $1 million. Prior to agreeing to lend the $1 million, the trustees did not require either REBCOR or Local 666 to provide the Fund with any documentation. The *only* condition the trustees imposed upon REBCOR prior to this extension of credit was that REBCOR execute a deed of trust and a deed of trust note, which were not executed until January 23, 1975.

Trustees Nash and Van Fossen, who voted on December 13, 1974, to lend the $1 million, were serving contemporaneously as officers and directors of REBCOR and as officers of the Local. Employer trustees Baker and Koch were members of Local 666. Additionally, Zahn played a major role in organizing REBCOR and getting it incorporated. Zahn was on REBCOR's initial board of directors. From REBCOR's inception, and on behalf of REBCOR and Local 666, Zahn oversaw (1) dealings with architects; (2) the location and purchase of the site; (3) construction bid solicitation; (4) dealings with the successful bidder through the completion of

construction in 1976; (5) negotiation and administration of the financing of the building from 1974 through 1976; and (6) dealings with REBCOR's and the Fund's attorneys, McGuire, Woods & Battle. Throughout this time and while serving as the Fund's administrator, Zahn was a Director of REBCOR and its Registered Agent.

At this same time, Bodsford, the president of REBCOR and the Local, worked as a superintendent for an electrical contractor, working directly under and out of the same office as Joseph Accardi who was then Chairman of the Trustees. During the same period, Trustee Nash was working as a foreman under Bodsford.

The $1 million loan transaction was closed on January 23, 1975, and the first loan proceeds of $80,244.03 were disbursed on the same date. No loan origination fee was collected. Interest on the deed of trust note was payable monthly commencing March 1, 1975. The note provides that the principal is due and payable within ninety days of demand, but not later than June 30, 1984. No principal repayment schedule is provided for in the note. Although the deed of trust specified the intention of the parties to adjust the interest rate from time to time, no reference is made in the note for adjustment of the interest rate and no specific mechanisms for increasing the interest rate were established. The note was secured by a deed of trust on REBCOR's property, which was executed by Nash as secretary of REBCOR.

Sometime after February 5, 1975, Nash, Van Fossen, and Zahn, acting as directors and on behalf of REBCOR while continuing to serve as fiduciaries to the Fund, joined in the execution of a board of directors' consent resolution authorizing REBCOR to borrow the initial

$1 million from the Fund and up to an amount not to exceed $1.5 million. This resolution specified that the rate of interest be adjusted from time to time, and the resolution was back dated to January 23, 1975. This resolution was the first formal act by the REBCOR board of directors approving the borrowing of $1 million.

Local 666 had paid REBCOR over $100,000 per year since 1973 in order that REBCOR could meet its financial obligations. Despite the history of the Local funnelling substantial funds to REBCOR in order to keep REBCOR solvent, the trustees did not require Local 666 to be signatory to the $1 million note. In fact, the decision to make the loan was predicated on the Local's continued funding of REBCOR, which continued to exceed $100,000 in years subsequent to 1975. REBCOR was incorporated by the Local, under directions from the International Office of the IBEW (the "International"), to insulate the Local from responsibility for the building corporation's debts. This fact did not, however, concern the lending trustees.

On August 25, 1975, after more than $800,000 had been disbursed by the Fund, and pursuant to Zahn's report that REBCOR would need an additional loan of approximately $400,000 to complete construction, the trustees agreed to make an additional $400,000 available to REBCOR. The lending of additional funds was to be conditioned on an agreement by REBCOR to pay any interest incurred by the Fund as a result of any borrowings made necessary because of the REBCOR loan.

At this time, REBCOR was over $12,000 behind in its interest payments to the Fund. The trustees did not attempt to evaluate any of the following: REBCOR's

need for additional funds; the value of the collateral; the need for sureties; the credit-worthiness of REBCOR or the Local; or the financial needs of the Fund. Again, no provision was made in the note for repaying principal before June 30, 1984, and Local 666 was not signatory on the note.

Subsequent to October 9, 1975, trustees Nash and Van Fossen, and administrator Zahn, again acting as directors and on behalf of REBCOR while continuing to serve as fiduciaries to the Fund, joined in the execution of a consent resolution dated September 30, 1975, authorizing REBCOR to borrow these additional funds.

On October 20, 1975, trustee Nash, on behalf of REBCOR, executed a note payable to the Fund with the same terms and conditions as the previous note. The second note was secured by a supplemental deed of trust. No loan origination fee was collected. Zahn was again responsible for having the loan documents drawn up by McGuire, Woods & Battle, but those loan documents varied from the terms authorized by the trustees in two material respects: (1) they did not impose on REBCOR an liability for interest incurred on money the Fund might be forced to borrow because of the REBCOR loans;[1] and (2) the note was for $500,000 instead of $400,000.

By March 1976, the total amount Zahn had actually disbursed to REBCOR was more than $1,411,000. The principal outstanding exceeded the trustees' maximum authorization by more than $11,000.

[1] At a later date, when the Fund was experiencing a serious cash-flow problem, REBCOR refused to honor this agreement since there was no written evidence of it.

Although there was no agreement to waive the timely payment of monthly interest, REBCOR's payment of interest due the Fund on its loan was sporadic between March and October 1975, and then ceased entirely until December 1976. By December 31, 1976, unpaid interest and penalties exceeded $140,000.

During the period of the delinquencies, trustees Nash and Van Fossen and administrator Zahn were intimately involved in the financial affairs of the Local and REBCOR. REBCOR's files were kept by Zahn in the Fund's offices until about June 1976. Trustee Nash signed all of REBCOR's check stubs during his tenure as secretary of REBCOR and, accordingly, was well aware that REBCOR was not making payments punctually to the Fund. In September 1976, Zahn reported to the REBCOR board of directors that $123,000 in delinquent interest was owed to the Fund. The Fund minutes for the same day do not reflect a report concerning a delinquency.

Zahn was delegated the duty of receiving and recording REBCOR interest payments and of reporting to the trustees should any difficulties have arisen. The financial reports prepared by Zahn and distributed to the trustees at each meeting reflected an "interest" line item prior to February 1975. Additionally, the minutes of trustees meeting of February 26, 1975, reflect that Accardi reported the receipt of an interest payment on the REBCOR loan. The Zahn financial reports failed to reflected any "interest" item again until February 1977.

On January 17, 1977, the Trustees held a meeting at which delinquent interest payments were discussed, and the trustees directed Zahn to provide them an up-to-date accounting of the loan status. By that time, REBCOR

was delinquent by at least $151,937.09 in interest and $9,227.39 in penalties. The Fund's 1975 DOL/IRS Form 5500, prepared by Zahn and signed on January 31, 1977, by trustees Accardi and Noonan falsely reported that no loans by the Fund or fixed income obligations due the Fund were in default as of December 31, 1975.

There followed various correspondence among the Trustees, Zahn, and the president of REBCOR; meetings; an appraisal of the property;[2] and, on February 28, 1977, a meeting of the Trustees[3] and the president of REBCOR. At that meeting, the REBCOR president proposed a solution to the delinquency problem. Further discussions, correspondence, and meetings ensued, and at their June 16, 1977, meeting, the trustees agreed to the following "cure": $86,196.81 of the unpaid interest was converted to principal to make the total principal $1,5 million as authorized by the Supplemental Deed of Trust note; the remaining $42,266.39 in unpaid interest was to be paid; and collection of the $7,874.72 in penalties was postponed for three years and would be waived

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[2] The appraisal, which was commissioned by REBCOR, was received on or about February 17, 1977. It valued the REBCOR property as of February 7, 1977, both land and building, at approximately $960,000, $160,000 of which was attributed to the land value. The appraisal reflected a reproduction cost in 1977 of $47.60 per square foot on the 24,552 square foot building. Almost three years earlier, the construction contract had been executed for $1,757,500 or $71.58 per square foot. A total of $1,815,315.39 was ultimately paid to the general contractor, which translated into a cost of $73.94 per square foot.

[3] By this time, successor trustees Bowles, Noonan, Jernigan, and Wilson had replaced lending trustees Cook, Nash, Van Fossen, and Koch. Lending trustee Baker had resigned but not yet been replaced. Successor trustee Parker took Baker's position by the time of the trustees' June 16, 1977, meeting.

altogether if the interest payments were kept current throughout that period.

Around this same time period in 1977, Davidson contacted the Department of Labor. He eventually spoke with DOL official Brophy who, at that time, was very interested in what Davidson had to say. Brophy advised Davidson that there was reason to believe that it might not be a proper transaction for a labor union to borrow money from a trust fund.

At a participants' meeting held shortly after the telephone conversation with Brophy, Davidson relayed to the trustees (some of whom were new) and to Zahn the information supplied to him by Brophy. In response to Davidson's comments, Zahn stated, in the presence of the trustees and other participants, that there could not be a problem because McGuire, Woods & Battle had inquired with the Department of Labor about whether the REBCOR loans were proper and had determined there was no problem.

Having received assurances that the loan was proper, Davidson called Brophy again and advised him that McGuire, Woods and Battle had already contacted the Secretary of Labor about these loans. Upon hearing this information, Brophy was no longer receptive to pursuing the matter.

There is, however, absolutely no evidence that McGuire, Woods and Battle ever contacted anyone at the Department of Labor concerning any aspect of the REBCOR loan transactions.

After being led to believe that the REBCOR loan

transactions were approved by the Department of Labor and were proper, Davidson thereafter directed his efforts towards resisting attempts within the union to increase his working assessments in order to pay for the REBCOR building. Davidson also sought aid from the International to prevent this working assessment increase, but the International refused to help him. All known avenues having been exhausted to no avail, Davidson refused to pay the working assessment increase and was expelled from the union.

By early 1979, the Fund's lack of liquidity had become so pronounced that one participant was denied preadmission hospitalization approval by Blue Cross-Blue Shield because the Fund had not paid its premiums in a timely manner. As of the February 8, 1979, trustees' meeting, the Fund had only about $123,350 in liquid assets available to pay over $348,000 in insurance premiums due, while $1,475,000 was tied up in the REBCOR loan.

An appraisal dated October 30, 1979, and commissioned by REBCOR, valued the collateral at from $907,000 to $1,000,000.

In April of 1981, Davidson, who was at that time low on bank hours, attended a trustees' meeting to obtain information about the Fund's operations in order to determine whether to self-pay or let his benefits terminate. He asked questions about employer contributions and Fund investments. In response to questions about the nature of the REBCOR loans, the trustees advised Davidson that the principal on the REBCOR notes was committed until June 30, 1984, and that there was nothing the trustees could do about raising the interest

rate or recovering the principal until that date. Davidson was given the impression that the current trustees did not want to discuss these matters with him and were being evasive.

Davidson filed suit on October 19, 1981.

This case revolves around the real estate lending practices of the lending fiduciaries and the evaluation of the REBCOR loan as an investment. Yet, not a single defendant came forward with proof of lending practices which would justify the manner in which the REBCOR loan was handled. Davidson alone undertook the task of providing the district court with the assistance of expert opinion on lending practices and the valuation of commercial real estate loans, i.e., affidavits of Bruce P. Hayden and David C. Tolzmann.

According to Mr. Hayden, handling a commercial real estate loan is a complex undertaking. Construction financing is especially risky because of the uncertainties beyond the borrower/developer's control — strikes, fires, delays caused by regulatory agencies, unanticipated cost increases, bankruptcies of contractors and subcontractors, the possibility of liens and other legal encroachments attaching to the property.

For these reasons, prudent and informed mortgage lenders carefully evaluate loan proposals. They take a formal, written application signed by the prospective borrower, which spells out the amount and terms of the loan, the purpose for which the funds are needed, an agreement to take the funds if approved, a security deposit to be forfeited if the loan is not taken down, and an advance deposit to cover fees or charges in connection

with the underwriting and issuance of the commitment, etc. The application should be accompanied by complete information on the subject property: plans, specifications, photographs, maps, surveys, zoning information, copies of existing or proposed leases, projected costs, projected operating expenses, credit information and the experience record in similar properties of the proposed borrower, and a market analysis demonstrating the need for and economic viability of the project.

After the application and accompanying information and documents have been submitted, the lender appraises the property, using its own staff or an appraiser of its own choosing, and billing the expense to the proposed borrower.

The lender then analyzes and underwrites all aspects of the transaction paying attention to location, the economic characteristics of the transaction, the suitability of the improvements, the indicated quality of construction, the record and reputation of the builder and architect, the detailed cost estimates with substantiation, copies of construction contracts, and requirements for bonding if there is any question about the financial responsibility of the parties. A written analysis and summary of the transaction is presented to the investment committee for final review.

If the transaction is approved, the lender issues a detailed commitment letter spelling out all the business details of the transaction and providing attorneys for both parties with an outline and blueprint from which the transaction can be structured legally.

During construction, reasonably competent construc-

tion lenders normally pay out only after the architect's certificate is checked, often after field verification of work done, and after the construction lender verifies that the total disbursed, including the presently contemplated disbursement, bears a proper relationship to the total cost of the building and to the progress of construction, e.g., that disbursements of forty-five percent of the loan proceeds will take place at the time when the building is forty-five percent completed, not twenty percent completed. There is also a check at the time of disbursement to make sure that adequate funds for completion are available in excess of those being provided from the construction loan. It was Mr. Hayden's opinion, after reviewing the stipulated facts and exhibits in this case, that these draw-down procedures were not followed with respect to the REBCOR loan, except for checking the architect's certificate, and that the union trustees (Cook, Nash and Van Fossen) agreed to fund the project knowing that funds necessary for completion were not in sight.

It was Mr. Hayden's opinion that the extent of documentation on the REBCOR loan would have been totally inadequate even for a $60,000 loan on an owner-occupied house. For example, the notes carry a provision for changing the rate of interest, but do not specify the circumstances, times, or amounts in which such changes could be made. There were no requirements for submission of regular quarterly or annual reports on the economics of the operation of the building securing the loan; no requirements for periodic financial statements of REBCOR, the borrower; none of the usual deed of trust and note provisions concerning possible fire or other casualty loss (the insurance provision being so minimal as to be meaningless), condemnation, or other contin-

gencies.

It was also Mr. Hayden's opinion that the loan was improperly priced. During the construction phase, it should have borne a floating interest rate tied to the prime rate. A 1 to 2 point fee should have been collected at the date of closing. Personal and corporate guarantees should have been required, at least during construction. Consideration should have been given to setting the interest rate after construction somewhat higher than the going A corporate bond rate for a term of twenty to twenty-five years, with provision for amortization. The only respect in which the lending fiduciaries satisfied any of this was to make the note callable 90 days after demand.

Within months after making the initial $1 million loan and without any investigation, either with respect to performance under the first loan (which Zahn was supposed to be monitoring and which was in default) or with respect to the ability of REBCOR to perform in the future, the lending trustees, at the urging of Mr. Zahn, approved the extension of an additional $400,000 in credit to REBCOR and failed to oversee the transaction to assure compliance with the terms of their approval (Zahn also handled this). In Mr. Hayden's opinion, no reasonably prudent real estate lender would have acted as they did.

REASONS WHY THE CAUSE SHOULD NOT BE REVIEWED

There are a number of reasons why a writ of certiorari should be denied in this case.

First, there are no special or important reasons justifying review. Petitioners breached serious fiduciary duties owed to the participants and beneficiaries of the Fund (imprudence, divided loyalties, and conflicts of interest), causing a loss of almost $500,000 in the value of the Fund's investment portfolio. They are attempting to escape liability by erecting meritless, technical defenses which turn, essentially, on factual determinations: (1) whether Mr. Davidson had actual or constructive knowledge of the imprudence, divided loyalties, and conflicts of interest more than three years before filing suit (which shortens the normal six-year period), and (2) whether Zahn had or exercised sufficient discretionary authority, control or responsibility that he was a fiduciary of the Fund.

This Court does not sit to review conflicts of evidence or to second-guess the conscientious factual determinations of lower court judges. *National Labor Relations Board v. Pittsburgh Steamship Co.*, 340 U.S. 498, 503 (1951). This consideration should be given especially great weight where, as here, there is absolutely no disagreement between the district court and any of the judges on the circuit court panel.

Second, the court of appeals' decision is not in conflict with the decision of any other federal court of appeals on the same matter. This is conceded by petitioners Accardi, *et al.*, on page twenty-two of their petition, hereafter referred to as "Accardi Petition."

Third, the court of appeals has not so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of

supervision. Indeed, none of the petitioners have suggested such a reason for review.

Fourth, while the court of appeals has, through affirmance of the district court, decided important questions of federal law relating to ERISA's statute of limitations and definition of "fiduciaries," there is no need for any of those questions to be decided by this Court, and none of those questions have been decided in a way that conflicts with applicable decisions of this Court.

A. *General Overview of the Statute of Limitations*

The district court found that Davidson filed suit within ERISA's general six-year limitation period, 29 U.S.C. § 1113(a)(1) (App. p. 24a), and this ruling has not been challenged. Instead, the trustees erroneously seek to invoke the more narrow three-year limitation period of either (or both) § 1113(a)(2)(A) or § 1113(a)(2)(B).

ERISA is a comprehensive remedial statute enacted by Congress to protect the interests of participants and beneficiaries of private sector employee pension and welfare benefit plans by, among other things, establishing standards of conduct for fiduciaries of such plans. The fiduciary responsibility provisions are to be interpreted both in light of the common law of trusts and the special nature and purposes of employee benefit plans. *Donovan v. Mazzola*, 4 Employee Benefit Cases ("E.B.C.") 1865, 1869-70 (9th Cir., 1983).

As a broad remedial statute designed to protect plan participants and beneficiaries, ERISA is to be given a liberal construction to effectuate its purposes. *M & R Investment Co., Inc. v. Fitzsimmons*, 484 F. Supp. 1041,

1054 (D. NV, 1980). *See also*, Sutherland, *Statutory Construction*, v. 3, § 60.01 (4th ed., 1974). Humanitarian, remedial statutes have traditionally been interpreted liberally by the courts. *Tennessee Coal Co. v. Muscoda Local No. 123*, 321 U.S. 590, 597 (1944) (wage and hour legislation). *See also, Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (securities law); *Sullivan v. Little Hunting Park,Inc.*, 396 U.S. 229, 237 (1969) (civil rights legislation); and *Urie v. Thompson*, 337 U.S. 163, 181-82 (1949) (Federal Employers' Liability Act).

Consistent with the liberal construction which must be afforded ERISA, any exemptions or limitations contained therein must be narrowly construed so as not to defeat the remedial purposes of the legislation. *See, A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).

In civil actions, statutes of limitations are affirmative defenses as to which the defendant carries the burden of proof. *See, Knott v. Pemo Leasing Co., Inc.*, 472 F. Supp. 564 (D. Ohio, 1979); *Moore v. Kuehn*, 602 S.W.2d 713 (Mo. App., 1980). Thus, the lending fiduciaries, who are asserting the applicability of the exceptions to the general six-year period, must establish facts sufficient to invoke the shortened period of limitations.

The lending fiduciaries also argue that if the statute of limitations bars some claims relating to the REBCOR loans, it bars all claims relating to them. This is erroneous. Statutes of limitations bar the remedy, i.e., the judicial means for enforcing a particular cause of action. They do not extinguish the substantive right. Therefore, if one avenue of judicial redress is cut off, the substantive right can be enforced through other judicial means which are not. *Campbell v. Haverhill*, 155 U.S. 610, 619

(1895); 51 AM. JUR.2d, *Limitation Of Actions* § 22 (1970). *See also, Vinson v. Graham*, 44 F.2d 772, 776-77 (10th Cir., 1930) (defining the concept of "cause of action" as the breach of a duty owed to the plaintiff which results in harm to the plaintiff and gives him a right of redress against the defendant).

In addition, a statute of limitations, like all statutes, is to be construed so as to make it consistent in all its parts, so that proper effect may be given to every section, clause, or part, and so that no sentence, clause or word shall be deemed to be void, superfluous, or insignificant. *Orman v. Van Arsdell*, 12 N.M. 344, 350 (S. Ct. N.M., 1904). Words may be disregarded only when to do so is consistent with the legislative intent or meaning. Sutherland, *supra* p. 21, vol. 2A, § 47.37. ERISA gives plan participants the right to seek judicial relief with respect to each breach of fiduciary duty committed. The right to seek relief for one breach cannot be barred because the right to seek relief for another breach may be barred. Such a construction would render superfluous each of the distinct types of fiduciary duties which Congress has declared are owed to participants and beneficiaries, lumping them all into a sort of generic, catch-all duty.

For these reasons, the fact that an action for breach of some fiduciary duties (i.e., lack of diversification, loans to a party-in-interest, etc.) may be barred does not mean that an action for breach of other fiduciary duties (i.e., imprudence, conflicts of interest, and violating the exclusive purpose rule) is barred.

B. *Davidson Did Not Have Actual Knowledge of Any Breach of Fiduciary Duty*

Section 1113(a)(2)(A) of Title 29, United States Code,

serves to reduce the general six-year limitations period to three years from the date "on which the plaintiff had actual knowledge of the breach or violation." This narrowing of the six-year limitations period is applicable only to situations where the plaintiff both (1) had actual knowledge, not constructive knowledge, of the act constituting the breach and (2) knew that the act constituted a breach. In the absence of any ambiguity, the Courts give effect to the plain meaning of the statute. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Congress' use of the term "had actual knowledge" in § 1113(a)(2)(A) contrasts sharply with its use in 29 U.S.C. § 1451(f) of the term, "should have acquired actual knowledge." Additionally, the use of the words "actual knowledge" in other statutes has been held to mean precisely that: actual knowledge and not constructive or imputed knowledge. *In Re Venson*, 234 F. Supp. 271, 273 (D. Ga., 1964), *aff'd*, 337 F.2d 616, 617 (5th Cir., 1964); *Moore v. Kuehn, supra* p. 21, (bankruptcy legislation); and *Colby v. Riggs National Bank*, 92 F.2d 183, 194 (D.C. Cir., 1937) (Uniform Fiduciaries Act).

Congress explained the concept of "knowledge" under ERISA when fashioning the co-fiduciary liability rules. For example, 29 U.S.C. § 1105(a)(3) imposes personal liability on a fiduciary "if he has knowledge of a breach of such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach." According to the legislative history, "if a fiduciary knows that another fiduciary of the plan has committed a breach, *and the first fiduciary knows that this is a breach*, the first fiduciary must take reasonable steps under the circumstances to remedy the breach. . . . ."

(Emphasis added.) House Conf. Rep. No. 93-1280, 93rd Cong., 2nd Session, p. 300, reprinted at 3 USCCAN (1974), p. 5080. Thus, to find simply "knowledge of a breach," not only must there be knowledge of an act constituting a breach, but there must also be knowledge that the act constituted a breach. *Brink v. DaLesio*, 496 F. Supp. 1350, 1383 (D.Md., 1980), *aff'd in part and rev'd in part (on other grounds)*, 667 F.2d 420 (4th Cir., 1981). *See also, Herman v. Painting Industry Insurance Fund*, 2 E.B.C. 2438 (S.D.N.Y., 1981) (determination of whether ERISA fiduciaries "knew" they were dealing with a party in interest.)

Given this meaning of the mere "knowledge of a breach" language of § 1105(a)(3), Congress must have intended a stricter interpretation to apply to the more precise terminology, "*actual* knowledge of the breach or violation," used in § 1113(a)(2)(A). The term "actual" rules out any constructive knowledge interpretation.

It is indeed strange for the lending trustees to assert actual knowledge on Davidson's part. The question of whether any of the defendants, below, had "knowledge of the breach" under § 1105(a)(3) was squarely presented in the district court. The lending fiduciaries were the active participants in the breaches; the successor trustees had complete access to all of the Fund's records; and all of the fiduciaries were charged with statutory duties under ERISA, including the duty of due diligence. Despite these factors, the district court found that not a single defendant had the requisite knowledge of any breaches. (App. pp. 36a-37a.)

In contrast, Davidson, like other Fund participants, had some knowledge of some very limited facts related

to the REBCOR loans. Whatever information that was disseminated was limited, contradictory, and at times, misleading. They heard in 1977 that the building was appraised at less than one million dollars, and they learned in 1977 that REBCOR was delinquent in its interest payments. On the other hand, they were informed that the 1977 delinquency "cure" would resolve the problems associated with the REBCOR loans, that the loans had been reviewed by McGuire, Woods & Battle, and that the loans had the approval of the Department of Labor.

At the time this case was submitted to the district court, Davidson was a 40 year old electrician. He has a twelfth grade education. Although Davidson had served on some Local 666 committees, he never held any union office, he never served as an ERISA fiduciary, he never served as an officer or director of REBCOR, and he never held any position with the Fund. For all practical purposes, Davidson was an outsider who had no knowledge concerning the deliberations and inner workings of the Fund and REBCOR (here the lender and the borrower).

Prior to contacting his present attorneys in 1981, Davidson knew nothing about the intricacies of prudent real estate lending practices (a standard imposed on the Fund fiduciaries by the prudence rule of ERISA). *Donovan v. Mazzola*, 2 E.B.C. 2115, 2133 (N.D. Cal., 1981), *aff'd*, 4 E.B.C. 1865, 1870 (9th Cir., 1983); *Marshall v. Glass/Metal Assoc. & Glaziers*, 507 F. Supp. 378, 384 (D. HI., 1980). Nor did he possess knowledge of what factors, documentation, or studies, if any, were considered by the trustees when the loans were made. Davidson did not know that over $1.4 million dollars was

loaned without any documentation and without consideration of crucial factors such as appraisals of the plans or projections of REBCOR's ability to pay.

Furthermore, prior to contacting his present attorneys in 1981, Davidson did not know the credit-worthiness of the borrower, whether there were any guarantors or sureties on the loans, the liquidity needs and reserve requirements of the Fund,[4] that the deed of trust notes were 90-day-notice demand instruments, that the first deed of trust provided for adjustments to the rate of interest without providing a specific mechanism for making adjustments, that there was no assignment of rents, or that there was no principal repayment schedule. Nor did Davidson know that two trustees and Zahn had acted as REBCOR directors (while they were Fund fiduciaries with respect to the REBCOR investment) to authorize REBCOR to borrow from the Fund.

The only actual knowledge finding the district court made with respect to Davidson was that he knew that trustees Noonan and Bowles served contemporaneously as directors of REBCOR and as trustees of the Fund. The court, therefore, erroneously concluded that Davidson had actual knowledge of conflicts of interest, in violation of 29 U.S.C. § 1106(b)(2). (App. pp. 29a-30a.) However, 29 U.S.C. § 1108(c)(3) expressly permits the holding of positions of potential conflict. To constitute a violation of § 1106(b)(2), the fiduciary must *act* on both sides of a transaction.

[4] The reserves of the Fund are used to provide coverage to employees during periods of unemployment through a system of bank hours. At the end of 1981, almost all of the reserves were tied up in this investment. The first time the bank hour liability was disclosed on the Fund's financial statement was on the financial statement for the year ended December 31, 1981, which was prepared after plaintiff brought this suit.

In summary, the lending trustees assert that Davidson had either actual or constructive knowledge of the "essential facts" and that the standard to be applied is an "integrated view of Davidson's actual and constructive knowledge." (Accardi Petition, p. 32.) To the contrary, § 1113(a)(2)(A) is triggered only by "actual knowledge of the breach or violation" sought to be barred.[5] Davidson did not have actual knowledge of the acts or omissions of the Fund fiduciaries or actual knowledge that any of those acts or omissions constituted ERISA breaches. Without a showing that he had both, there is simply not enough evidence to overturn the lower court decisions that Davidson did not possess the requisite "actual knowledge of the breach or violation." (App. pp. 29a-30a; 66a, note 17.)

C. *The Reporting Exception Does Not Apply Because the Fund Fiduciaries Did Not Disclose the Breaches At Issue*

Section 1113(a)(2)(B) of Title 29, United States Code, provides for a three year limitations period beginning on the date "on which a report from which [a plaintiff] could reasonably be expected to have obtained knowledge of such breach or violation was filed with the Secre-

[5] An early version of the statute of limitation *was* triggered by mere knowledge of facts. It provided that "[n]o action, suit, or proceeding based on a violation of this section shall be maintained unless it be commenced within three years after the filing with the Secretary of a report, statement, or schedule with respect to any matter disclosed by such report, statement, or schedule, or, with respect to any matter not so disclosed, within three years after the complainant otherwise has notice of the facts constituting such violation. . . ." S.1557 § 14(h), 93d Cong., 1st Sess. 36 (1973), *reprinted in* I Senate Subcomm. on Labor, Comm. on Labor and Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974, at 315 (1976). But, Congress rejected that standard in favor of the stricter language in § 1113(a)(2).

tary under this subchapter." The purpose and effect of this provision is to encourage the filing of full and accurate reports which are required by the Act. Criminal penalties back up the requirement. 18 U.S.C. § 1027.

The plain language of the statute of limitations makes it clear that the report itself must impart knowledge of the breach. There is no authority to support a theory that combines this exception with the "actual knowledge" exception, as the lending fiduciaries argue (Accardi Petition, at 32), in order to create a hybrid exception to the six-year rule, i.e., some actual knowledge plus some constructive knowledge equals the requisite actual and/or constructive knowledge. If the report does not disclose the existence of an actionable claim of fiduciary breach, the requirements of the statute are not satisfied.

The ERISA report most likely to disclose a fiduciary breach is the annual report (Form 5500) filed by the plan administrator with the Secretary pursuant to 29 U.S.C. § 1024(a)(1)(A). In this report, fiduciaries must disclose extensive information concerning plan financial operations and fiduciary activities, as required by 29 U.S.C. § 1023.

None of the Form 5500's filed by the Fund fiduciaries disclosed: (1) the imprudence involved in making the REBCOR loans; (2) the fact that Nash, Van Fossen, and Zahn acted as REBCOR directors to authorize the borrowing of the money; or (3) that the lending fiduciaries were trying to provide a home for the Local instead of serving the exclusive purpose of providing benefits to participants and their beneficiaries.[6] Therefore, the

[6] The lending trustees assert that Davidson's claim under 29 U.S.C. § 1104(a)(1)(D) and the Virginia Prudent Man Statute, which was held

three-year limitations period based on filings is unavailable.[7]

D. *Zahn Was a Statutory Fiduciary with Respect to the REBCOR Investment*

Zahn's entire brief is devoted to erroneously challenging the lower courts' determination that Zahn was a

barred by the statute of limitations (App. p. 28a), was identical to his claim of imprudence under 29 U.S.C. § 1104(a)(1)(B), which should, therefore, also be barred. (Accardi Petition, at 24.) Davidson, however, neither requested, nor received, a ruling on the broad question of prudence under the Virginia Prudent Man Statute. He requested a ruling on whether the overconcentration of Fund assets in the REBCOR loan (a diversification claim) was a violation of 29 U.S.C. § 1104(a)(1)(D) and the Virginia Prudent Man Statute. (Plaintiff's Proposed Findings of Fact and Conclusions of Law, p. 13, no. 23, Court of Appeals Joint Appendix, at 35.) Accordingly, the district court, treating this as a diversification claim, ruled that it was barred by the statute of limitations for the same reasons that the ERISA diversification claim was held barred by the statute of limitations. (App. pp. 18a-19a, 28a.) Logic dictates that, if Davidson had presented this claim as one of prudence and the district court had ruled that it was identical to the ERISA prudence claim, the court would have also ruled that it survived the statute of limitations defense just as the ERISA prudence claim. Furthermore, the ERISA prudence standard is not identical to the common law rule embodied in the Virginia rule, i.e., how a prudent man would invest his own property. Va. Code § 26.45-1. The ERISA rule is a more stringent rule, i.e., how a man familiar with such matters would invest the property of others. *See*, Kroll & Tauber, *Fiduciary Responsibility and Prohibited Transactions*, 14 Real Property, Probate & Trust Journal 657, 662 (Winter 1979).

[7] The lending fiduciaries argue that some of the structural deficiencies (e.g., lack of an amortization schedule) were apparent from the face of the note filed with Form 5500 for the year 1976 and, thus, served to impart constructive knowledge of all breaches. (Accardi Petition, at 29.) To the contrary, for example, an amortization schedule could have been set forth in a side agreement; a provision for adjusting the rate of interest was contained in the deed of trust, although it was not contained in and, therefore, not apparent from the face of the note; and Mr. Hayden indicated that a balloon note could have been structured in an acceptable manner.

statutory fiduciary with respect to the REBCOR investment.

A "person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan ... ." 29 U.S.C. § 1002(21)(A). Congress adopted a functional approach to determine who the fiduciaries of a plan are. *Brink v. DaLesio, supra* p.24, 496 F. Supp. at 1374-75; *Marshall v. Mercer*, 4 E.B.C. 1523, 1528 (N.D. Tex., 1983); *Eaton v. D'Amato*, 3 E.B.C. 1003, 1005-1006 (D.D.C., 1980).

Zahn possessed and exercised a generous degree of latitude over the day-to-day administration of the Fund and the REBCOR investment. This made him a statutory fiduciary.

Fifth, Zahn's due process claim (Zahn Petition at 19, *et seq.*) is improperly cast in terms of the Fourteenth Amendment, which applies to the States, instead of the Fifth Amendment, which applies to the Federal Government. *See, United States v. Banmiller*, 198 F. Supp. 872, 875 (n.l) (E.D. Pa., 1961), *reversed on other grounds*, 310 F.2d 720 (3d Cir., 1962). In addition, Zahn has not complied with Rule 28(b) of this Court, which requires notification to the Solicitor General when the constitutionality of an Act of Congress is drawn into question and neither the United States nor any department, office, agency, officer, or employee thereof is a party. The defects in presenting this issue demonstrate its insignifi-

cance, even in Zahn's view.

Furthermore, a review of Zahn's Answer, Amended Answer, Trial Brief and Reply Brief filed in the district court, and Brief and Reply Brief for Appellant filed in the court of appeals reveals that this due process claim has never before been raised in this proceeding. Thus, it would not properly be before this Court on certiorari. *Tennessee v. Dunlap*, 426 U.S. 312, 316 (n.3) (1976).

CONCLUSION

There is no reason justifying review of this cause; therefore, both petitions for a writ of certiorari should be denied.

Respectfully submitted,

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